FILED

No. 05- 05-800 DEC 15 2005

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IN THE

Supreme Court of the United States

SOUTHERN UNION COMPANY,

Petitioner,

v.

JAMES M. IRVIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit lacked the authority to depart from what it acknowledged was the literal reading of Fed. R. Civ. P. 4 to hold that the time to file a notice of appeal runs, not from the entry of an order disposing of the last remaining motion enumerated in Rule 4(a)(4)(A), but from the later entry of a final judgment.

2. If the answer to the first question is in the negative, whether the Ninth Circuit misapplied this Court's decisions in vacating a punitive damages award against a public official based on his corrupt abuse of his quasi-judicial office and on his later efforts to destroy and fabricate evidence, where the punitive award was 154 times compensatory damages but only one-half of the actual harm the public official knew would result from his misconduct.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner Southern Union Company has no parent corporation and no publicly held company owns 10% or more of its stock.

Respondent James M. Irvin was the only defendant who was party to the appeal below in the Ninth Circuit. The other defendants, who settled with petitioner and were not parties to the appeal below, were Southwest Gas Corporation, ONEOK Inc., Michael Maffie, Thomas Hartley, Gene Dubay, Thomas Sheets, John Gaberino, Jack D. Rose, Edward Zub, and Larry W. Brummett.

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Petitioner Southern Union Company ("Southern Union") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Ninth Circuit sought to be reviewed is reported at 415 F.3d 1001 (9th Cir. 2005) (1a - 31a). The Ninth Circuit denied rehearing and rehearing en banc and amended its first opinion on other grounds in an order reported at 423 F.3d 1117 (9th Cir. 2005) (89a - 91a). The opinions of the District Court denying respondent James M. Irvin's post-trial motions are reported at 281 F. Supp. 2d 1090 (D. Ariz. 2003) (34a - 67a) and 281 F. Supp. 2d 1117 (D. Ariz. 2003) (70a - 88a).

STATEMENT OF JURISDICTION

The judgment of the Ninth Circuit was entered on July 13, 2005. A timely petition for rehearing and rehearing en banc was denied on September 16, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RULES INVOLVED

Rule 2 of the Federal Rules of Appellate Procedure provides:

> On its own or a party's motion, a court of appeals may—to expedite its decision or for other good cause—suspend any provision of these rules in a particular case and order proceedings as it directs, except as otherwise provided in Rule 26(b).

Rule 4 of the Federal Rules of Appellate Procedure provides:

> *(a) Appeal in a Civil Case.*
>
> *(1) Time for Filing a Notice of Appeal.*
>
> *(A)* In a civil case, except as provided in Rules 4(a)(1)(B),4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered. . . .
>
> *(4) Effect of a Motion on a Notice of Appeal.*
>
> *(A)* If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:
>
> *(i)* for judgment under Rule 50(b); [or]
>
> . . .
>
> *(v)* for a new trial under Rule 59 . . . .

(B) . . .

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment altered or amended upon such a motion, must file a notice of appeal . . . within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

. . .

(5) Motion for Extension of Time.

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause. . . .

Rule 26 of the Federal Rules of Appellate Procedure provides:

(b) Extending Time. For good cause, the court may extend the time prescribed by these rules or

> by its order to perform any act, or may permit an act to be done after that time expires. But the court may not extend the time to file:
>
> > *(1)* a notice of appeal (except as authorized in Rule 4). . . .

STATEMENT OF THE CASE

Southern Union, a natural gas utility, brought this action against respondent James M. Irvin ("Irvin"), among others,[1] in the United States District Court for the District of Arizona, alleging that Irvin, Chairman of the Arizona Corporation Commission ("ACC"), had misused his office intentionally to interfere with Southern Union's prospective business opportunities and contractual relations. The basis for jurisdiction in the District Court, the court of first instance, was 28 U.S.C. § 1332. On December 18, 2002, the jury returned a verdict against Irvin for $390,072.58 in compensatory damages (after adjustment for comparative fault) and $60,000,000 in punitive damages. On appeal, the Ninth Circuit vacated the jury award of $60 million in punitive damages and remanded for remittitur or new trial on punitive damages.

I. *Facts Relating To Untimeliness of Appeal*

On January 3, 2003, without waiting for entry of judgment, Irvin filed a timely post-trial motion, pursuant to Fed. R. Civ. P. 50(b) and 59, for judgment notwithstanding the verdict or for a new trial or remittitur. The District Court

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1. The other defendants, all of whom settled with Southern Union, included Southwest Gas Corporation, ONEOK Inc., Michael Maffie, Thomas Hartley, Gene Dubay, Thomas Sheets, John Gaberino, Jack D. Rose, Edward Zub and Larry W. Brummet.

denied Irvin's post-trial motion in its entirety by an order entered on July 28, 2003 (the "July 28 Order"). The District Court entered a final judgment on the jury's verdict on August 18, 2003.

Irvin filed his notice of appeal on August 29, 2003 — 32 days after entry of the July 28 Order. Irvin never filed a motion with the District Court to extend his time to file his notice of appeal pursuant to Fed. R. App. P. 4(a)(5). On September 30, 2003, Southern Union moved in the Ninth Circuit to dismiss Irvin's appeal as untimely. On November 3, 2003, the motions panel denied the motion without prejudice to renewal. Southern Union renewed its objection to the Ninth Circuit's jurisdiction in its brief in chief.

Under Fed. R. App. P. 4(a)(1), an appeal must be filed "within 30 days after the judgment or order appealed from is entered," "*except as provided in Rule. . .4(a)(4)*" (emphasis added). Fed. R. App. P. 4(a)(4)(A) requires that where, as here, post-trial motions have been timely filed, a notice of appeal must be filed within 30 days from the entry of the order disposing of the last such post-trial motion. The July 28 Order disposed of Irvin's post-trial motion, and Irvin's 30-day appeal period ran from entry of the July 28 Order. Irvin's notice of appeal, filed 32 days later, was not timely filed.

In its opinion, the Ninth Circuit acknowledged that "[r]ead literally, the rule [Rule 4(a)(4)(A)] applies," and the "appeal period expired August 28, 2003," before the notice of appeal was filed. Nonetheless, despite the plain language of the applicable rule, the Ninth Circuit declined to dismiss the appeal, stating that "[w]e do not believe that the rule was intended to work in this way," given that on July 28, 2003, final judgment had not yet been entered. (6a) The Ninth Circuit thus effectively extended Irvin's time to file his notice

of appeal, although under Fed. R. App. P. 2 and 26(b)(1), it was without authority to do so.

II. *Facts Underlying Jury's Punitive Damages Verdict*

Irvin intentionally abused his position as Chairman of the ACC, a quasi-judicial body with the responsibility to approve mergers between natural gas utilities, to derail a two billion dollar offer from Southern Union to merge with Southwest Gas Corporation ("Southwest"), which would have created the largest natural gas utility in the country, in favor of a competing, less favorable merger offer from ONEOK, Inc. ("ONEOK"). In doing so, Irvin engaged in trickery and deceit, sought to corrupt the regulatory process in three states, and attempted to obstruct the judicial process by lying on the witness stand, fabricating evidence and destroying documents. Irvin's surreptitious crusade to derail Southern Union's offer was driven by the undisclosed financial interest of Irvin's crony and political supporter, Jack Rose ("Rose"), in the competing ONEOK offer. All the while, Irvin knew that his misconduct would cause at least $108 million — the difference between the Southern Union and ONEOK offers — in actual harm to Southwest shareholders, as well as hundreds of millions of dollars in lost profits and other damages to Southern Union and in lost cost savings to Arizona consumers.

1. Irvin's interest in the merger offer competition. Irvin was elected one of the three commissioners of the ACC in 1997, served as Chairman of the ACC from November 1997 to May 1999, and continued to serve as ACC Commissioner through and after trial.

The ACC is "treated as a fourth branch of government in Arizona," *Polaris International Metals Corp. v. Arizona Corporation Commission*, 133 Ariz. 500, 506-7, 652 P.2d 1023, 1029 (1982), and serves a quasi-judicial function.

See, e.g., Arizona Constitution, Article 15, § 4 (ACC has the "power to inspect and investigate the property, books, papers, business methods, and affairs of . . . any public service corporation doing business within the State, and . . . the power of a court of general jurisdiction to enforce attendance of witnesses and the production of evidence by subpoena, attachment, and punishment . . .").

In June 1997, Irvin nominated Rose, a lawyer who had worked on Irvin's campaign, to be Executive Secretary of the ACC. On December 31, 1998, after ONEOK's offer was announced, Rose resigned as Executive Secretary, but two days later, Irvin — without the knowledge of the other ACC commissioners — re-employed Rose as a "Loaned Executive" to the ACC.

In December 1998, Southwest announced ONEOK's merger offer to Southwest shareholders at $28.50 per share. Beginning that same month, after Irvin and Rose had previously met with Prudential Securities, Inc. ("Prudential"), a New York investment bank, Rose pursued a business relationship with Prudential, touting his connections with Southwest and ONEOK, his ability to advise them on important regulatory issues related to their merger, and his ability to refer underwriting business to Prudential in connection with the merger.

On February 1, 1999, Southern Union offered $32.00 per share, or $108 million more than ONEOK, with otherwise identical merger terms. On February 21, 1999, the Southwest Board of Directors unanimously determined that Southern Union's offer was "superior," "doable" and had "the ability to get regulatory approval." Southwest Board members were "excited about" and "very interested" in Southern Union's offer.

On February 12, 1998, Irvin told ONEOK's Chairman that he knew about Southern Union's non-public offer, did not want a "bidding war" between ONEOK and Southern Union, and planned to send a letter to the Southwest Board. A few days later, ONEOK agreed that Rose could arrange a meeting between Prudential and ONEOK.

On February 23, 1999 — just after Southern Union's offer became public — Rose began negotiating an agreement with Prudential whereby Rose would be compensated for referring business to Prudential. Telephone records introduced at trial showed an increase in and distinct pattern of communications between Irvin and Rose on or about this and other critical dates.[2]

On March 5, 1999, Irvin told ONEOK that Rose had given Irvin a "good report" on ONEOK, that Irvin intended to contact the California Public Utilities Commission ("CPUC") and the Public Utilities Commission of Nevada ("PUCN") (which also had jurisdiction over a Southwest merger), and that Irvin had concerns about Southern Union. By that date, ONEOK attorneys already were working on a letter (the "Irvin Letter") for Irvin to send to the Southwest Board to influence it to approve the ONEOK proposal over the Southern Union proposal.

Already in March 1999, ONEOK well knew Irvin's power to influence the Southwest Board. As a ONEOK lawyer (a friend of Irvin and Rose, who also campaigned for Irvin) put it in contemporaneous notes introduced at trial:

> Think they have [Southwest] Bd well in hand. Letter from one or more Chair would sink [Southern Union]. . . . Having a regulator press

2. Asserting his Fifth Amendment right against self-incrimination, Rose declined at trial to testify concerning his conversations and dealings with Irvin.

> the case made it extremely credible . . . Jim [Irvin] can say [a Southern Union] application will either not be approved, or approved [with] so many restrictions that it won't fit with [Southern Union's] financing plan or will be unacceptable to [Southern Union].

In March 1999, according to internal Prudential e-mails introduced at trial, Rose was telling Prudential that ONEOK had a strong motive to reward him for helping the company obtain favorable regulatory action and that he was confident that he could persuade ONEOK to name Prudential as a managing underwriter. On March 10, 1999, a Prudential executive reported that Rose said that "if he does deliver [ONEOK] he wants to be paid big time." That same day, Prudential agreed to pay Rose a large percentage of fees paid to Prudential by ONEOK. Rose and Irvin spoke for 24 minutes that day. On March 19, 1999, Rose and Prudential executed the fee agreement, and Irvin and Rose again spoke by telephone.

2. Irvin's improper interference. Having secured the fee agreement with Prudential and their relationship with ONEOK, Irvin and Rose then set about to interfere with Southern Union's merger proposal and to further ONEOK's.

In March 1999, Irvin and Rose lobbied other state regulators on behalf of ONEOK and against Southern Union. On March 16, 1999, they met with CPUC representatives in San Francisco, where Irvin urged the CPUC to send Southwest the Irvin Letter favoring ONEOK. CPUC commissioners testified that Irvin's conduct was inappropriate and that they would not have met with Irvin had they known of Irvin's and Rose's involvement with ONEOK and Prudential.

On March 24, 1999, Irvin and Rose also met in Reno with the PUCN chair, who testified that Irvin urged her to send the Irvin Letter to Southwest, but that she refused to do so. A PUCN attorney testified that the Irvin Letter could be "Exhibit 1 to an interference with the prospective business advantage tort." The next day, Irvin met with the Nevada Governor, who was Southwest's former chairman. He also declined to send the Irvin Letter, but, at Irvin's instigation, called Southwest to advise the Southwest Board to "read between the lines" of the Irvin Letter the Board would soon receive.

Irvin then proceeded to lobby the Southwest Board directly. In early April 1999, before the Southwest Board met to discuss the competing merger offers, Irvin faxed Southwest the Irvin Letter, which only Irvin signed, but which falsely purported to represent the views of the CUPC and the PUCN as well. Irvin then telephoned Southwest's CEO and Chairman, who tape-recorded the call, during which Irvin expressed "strong" views about Southern Union's supposed inability to obtain regulatory approval for its merger proposal.

Irvin at all times concealed his activities from the ACC. He did not disclose to his fellow ACC commissioners any of the drafts of the Irvin Letter, and he did not give the ACC, CPUC or PUCN notice when he sent the Irvin Letter to Southwest. He also did not disclose his trips to the CPUC and PUCN, which he arranged personally and for which he did not seek reimbursement from the ACC (despite numerous prior occasions where he had sought such reimbursement for as little as 75 cents).

3. Irvin's lobbying convinced the Southwest Board to reject Southern Union and approve ONEOK. At the Southwest Board meeting, the Board members read copies of the Irvin Letter and listened to the tape-recording of the Irvin telephone call. In assessing the competing merger proposals, the Board members were swayed by Irvin's misrepresentations about Southern

Union's supposed inability to receive regulatory approval.[3] Those misrepresentations caused the Southwest Board's extraordinary rejection of Southern Union's financially superior proposal.[4]

In April 1999, after its merger offer was approved, ONEOK indicated its readiness to do business with Prudential, and Rose began pressing Prudential to increase substantially the fees payable to Rose for ONEOK business brought to Prudential. In May 1999, Rose informed Prudential that ONEOK agreed to hire Prudential as underwriter to finance the Southwest merger. On June 11, 1999, Rose e-mailed Prudential concerning ONEOK's obtaining regulatory approval in Nevada ("We had a major win") and its progress in Arizona. A few days later, Rose and Prudential signed a new agreement providing for the increased compensation for Rose. Again, on days when Rose had these and other critical communications and meetings with ONEOK and Prudential, Rose had frequent and lengthy telephone calls with Irvin.

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3. There of course is no evidence that Irvin was campaigning against the Southern Union proposal for anything other than personal gain, given that there was no basis whatsoever for his misrepresentations concerning Southern Union and, indeed, that there has never been regulatory denial of a natural gas company merger in the history of the country.

4. Southwest Board members testified to this effect in contemporaneous shareholder derivative litigation. Moreover, in its April 26, 1999 press release announcing that the Board had rejected Southern Union's higher offer in favor of ONEOK's, Southwest stated:

> [T]he Southwest Gas Board believes that Southern Union would face a more protracted and difficult time in obtaining regulatory approvals, extending eighteen months or longer.

Shortly after the complaint in this action was filed on July 19, 1999, ONEOK canceled the planned $300 million debt offering to finance the Southwest merger. The ONEOK-Southwest merger was later abandoned.

4. Irvin's attempts to obstruct the judicial process in this action. An ACC employee testified at trial that Irvin, in July 1999, personally shredded the majority of documents gathered by his secretary as responsive to a subpoena served on him to produce documents related to the Southwest merger, and when he gave the few remaining documents back to his secretary, Irvin said about the subpoena response: "Now it's ready."

Irvin fabricated evidence for trial. Immediately before trial in 2002, Irvin's counsel announced that new exculpatory evidence had been discovered — a set of "contemporaneous" 1999 notes by Irvin's wife of a telephone conversation during which Rose supposedly stated that Irvin was not involved in any misconduct. After Southern Union received the original notes for forensic examination, Irvin's counsel retracted the claim and told the District Court that the notes were written the week before trial.

Irvin also testified falsely at trial. For example, Irvin testified that he called Southwest on April 5, 1999 only to confirm Southwest's receipt of the Irvin Letter. However, Southwest witnesses — in testimony and contemporaneous notes — established that Irvin's call was a planned, substantive attack on Southern Union. Irvin also testified falsely that he had not discussed the Southwest merger with CPUC regulators, contrary to their testimony that Irvin gave an appearance of partiality, lobbied for ONEOK and prejudged and disparaged the Southern Union offer.

5. The enormous resulting harm. Irvin's conduct caused enormous harm well beyond Southern Union's $390,000 in out-of-pocket compensatory damages. Irvin knowingly caused Southwest shareholders to lose at least $108 million. Irvin caused Southern Union to suffer over $500 million in potential lost profits. Because of Irvin's misconduct, natural gas consumers in Arizona lost hundreds of millions of dollars in potential cost savings that would have resulted from the Southern Union merger proposal. Finally, Irvin's abuse and breach of the public trust placed in him by the citizens of Arizona caused immeasurable public harm.

6. The Ninth Circuit's opinion. The Ninth Circuit agreed that the reprehensibility of Irvin's conduct justified an award of punitive damages based on, among other things, his "exploitation of high public office," his pursuit of a "payoff," and the "grave injuries to the judicial process." Nonetheless, while stating that it did "not mean to minimize the magnitude of Irvin's exploitation of his office" (22a), the Ninth Circuit, focusing on the compensatory damages and not on the enormous other actual and potential harm caused by Irvin's misconduct, held that the ratio of punitive to compensatory damages could not "survive the constitutional scrutiny" required by this Court (19a). The Ninth Circuit concluded that the District Court mistakenly relied on the ratios in civil rights cases as a benchmark in approving the ratio here, stating that the "redress of racial, religious or gender discrimination has been treated as a special area of public concern" (22a), notwithstanding that Irvin's conduct caused severe harm to the public interest. The Ninth Circuit also ignored the clear historical record cited by the District Court (52a - 54a) demonstrating that punitive damages were first imposed and, indeed, are particularly needed precisely to punish official misconduct and public corruption exemplified by Irvin's conduct.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit's Refusal To Dismiss The Appeal Contravenes Applicable Appellate Rules And This Court's Decisions

There is no question as to the plain language and effect of Fed. R. App. P. 4 here. Rule 4(a)(1) provides that a notice of appeal must be filed within 30 days after entry of the "judgment or order appealed from," "*except* as provided in Rule 4(a)(4)" (emphasis added). Rule 4(a)(4)(A) provides that if one or more enumerated post-trial motions — including Rule 50(b) and Rule 59 motions — are timely filed, then the 30-day period runs not from the entry of the "judgment or order appealed from" but from the entry of the "order disposing of the last such remaining motion."

Irvin's 30-day appeal period therefore ran from entry of the July 28 Order, which disposed of all of the relief requested in his post-trial motion under Rules 50(b) and 59. The Ninth Circuit in fact agreed with all this; it identified no ambiguity in Rule 4: "*Read literally, the rule applies.* . . . The appeal period expired August 28, 2003 [*sic*]."[5] (6a) (emphasis added).

Irvin filed his notice of appeal on August 29, 2003. This filing thus was untimely under what the Ninth Circuit itself agreed is the "literal" — that is, plain — language of Rule 4. The Ninth Circuit declined to dismiss the appeal, because "[w]e do not believe that the rule was intended to work in this way" (6a) — *i.e.*, for Irvin's 30-day appeal period to begin to run before entry of the judgment on August 18, 2003. However, in doing so, the Ninth Circuit contravened not only the clear appeal time provisions of Rule 4, but also

5. In fact, the appeal period expired on August 27, 2003, 30 days from July 28, 2003.

the clear limit, under Rules 2 and 26(b), on its authority to suspend provisions of the appellate rules. The Ninth Circuit's decision also conflicts with this Court's decisions in *Eberhart v. United States*, 126 S. Ct. 403 (2005) (courts must enforce filing periods whether they are jurisdictional or properly invoked claim processing rules which are "inflexible"); *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988) (courts of appeals are not permitted to extend the time for filing a notice of appeal); *Acosta v. Louisiana Dep't of Health & Human Res.*, 478 U.S. 251 (1986) (reversing Ninth Circuit's refusal to follow plain wording of Rule 4); and *Browder v. Director, Dep't of Corrections of Illinois*, 434 U.S. 257 (1978) (timely filing of notice of appeal is mandatory and jurisdictional).

A. The Ninth Circuit Had No Authority To Extend Irvin's Time To File His Notice of Appeal

Fed. R. App. P. 2 gives the courts of appeals the power for "good cause" to suspend any provision of the appellate rules, with one exception — "except as provided in Rule 26(b)." Rule 26(b) provides that the courts may not extend the time to file a notice of appeal, "except as authorized in Rule 4." However, Rule 4 authorizes only the district courts, *not* the courts of appeals, to extend the time to file a notice of appeal and then only if a party so moves within certain time limits. Fed. R. App. P. 4(a)(5). Here, Irvin never moved to extend the time to file his notice of appeal.

By declining to dismiss Irvin's appeal, the Ninth Circuit effectively suspended the clear provisions of Rule 4: it (retroactively) extended by two days the time for Irvin to file his notice of appeal. However, under Rules 2 and 26(b), the Ninth Circuit lacked the authority to do so.

The Ninth Circuit's decision thus also is contrary to this Court's holding in *Torres*, 487 U.S. at 317, that a court "may not waive the jurisdictional requirements of [Rule 4], even for 'good cause shown' under Rule 2, if it finds that they have not been met." Indeed, this Court made clear that, given Fed. R. App. P. 2, the courts of appeals must apply Rule 4 in an "implacable fashion," even if it leads to a "harsh result." 487 U.S. at 318.[6] Here, the Ninth Circuit admitted that Irvin had not met the "literal" requirements of Rule 4, yet it impermissibly failed to enforce them.

B. This Court Has Made Clear That Rule 4 Must Be Enforced According To Its Plain Terms

The Ninth Circuit's holding conflicts also with this Court's decision in *Acosta*, 478 U.S. at 253-54. There, this Court expressly disapproved the Ninth Circuit's decision in *Calhoun v. United States*, 647 F.2d 6 (9th Cir. 1981), in which the Ninth Circuit accepted an appeal by reading out of an earlier version of Fed. R. App. P. 4(a)(2), the phrase "[except] as provided in (a)(4) of this Rule 4." 478 U.S. at 254. That phrase no longer appears in Rule 4(a)(2), but it is the same phrase that the Ninth Circuit here has read out of Rule 4(a)(1) — where it now appears — in order to save Irvin's appeal.

Acosta stands for the teaching that the courts of appeals must follow the "plain wording of the Rules" and, in particular, the "plain import of [the] language" of Rule 4. 478 U.S. at 253-54. Ignoring *Acosta*, however, the Ninth Circuit once again has declined to apply the plain language of Rule 4[7] and has

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6. The amendments to Rules 2 and 4 since *Torres* was handed down are immaterial here.

7. That the Ninth Circuit's refusal to apply Rule 4's plain language is unjustified is confirmed by Rule 4(b)(3)(A). That Rule

(Cont'd)

attempted to justify its departure from that language by invoking the purported policy underlying the Rule.[8] (6a)

(Cont'd)
provides that the time to file a notice of appeal in a criminal case runs from the entry of the order disposing of the last post-trial motion or the entry of the judgment of conviction, "whichever is later" — in effect, the result adopted here by the Ninth Circuit in this civil action. However, if the drafters of the Rules had intended that same result in civil cases, they clearly knew how to draft for it. That they did not confirms, under well-settled principles of construction, *e.g.*, *Swierkiewicz v. Sorema N.A.*, 534 U.S 506, 513 (2002), that the Ninth Circuit's view of the intent of the Rules is incorrect. Likewise, the plain meaning of Rule 4(a)(4)(B)(ii) is inconsistent with the Ninth Circuit's decision here. Rule 4(a)(4)(B)(ii) requires that a notice of appeal be filed 30 days after entry of the order disposing of the last remaining Rule 4(a)(4)(A) post-trial motion, even where the order requires entry of an amended judgment. The appeal period does *not* start running again from entry of the amended judgment (as it should if the Ninth Circuit's re-writing of Rule 4 were correct).

8. *ABF Capital Corp. v. Osley*, 414 F.3d 1061 (9th Cir. 2005), reaches a result similar to the Ninth Circuit's here, but is equally wrong in refusing to apply the plain language of Fed. R. App. P. 4. *Osley* relies on the separate document requirement codified at Fed. R. Civ. P. 58(a) to hold that a "premature post-judgment motion may not accelerate the deadline for appeal before a separate document has been entered." 414 F.3d at 1065. However, the separate document requirement codified at Fed R. Civ. P. 58(a) has no bearing here. Its purpose has always been to clarify when appeals begin to run arising from final judgments, *not* orders disposing of the post-trial motions enumerated in Rule 4(a)(4)(A). Indeed, Rule 58(a)(1) expressly exempts from the separate document requirement orders on those motions. Moreover, under Rule 58(b)(1), when such an order on an enumerated motion is "entered in the civil docket under Rule 79(a)," "[j]udgment is entered[.]" In this case, the July 28 Order was entered in the civil docket on July 28, and "judgment" was entered. Moreover, the *Osley* court incorrectly characterized the Rule 59(e) motion in that case as "premature." Nothing in any rule bars the filing of that
(Cont'd)

In *Acosta*, this Court soundly rejected such an approach.[9] *See also Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533, 540-41 (1991) ("We give the Federal Rules of Civil Procedure their plain meaning. As with a statute, our inquiry is complete if we find the text of the Rule to be clear and unambiguous.") (citation omitted); *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120 (1989) (same).

C. Whether Jurisdictional Or Not, The Rule 4(a)(4)(A) Appeal Period Must Be Enforced Inflexibly

The Ninth Circuit's decision also conflicts with this Court's teaching in its recent decision in *Eberhart*, in which the Court clarified that certain rules that have been described as "mandatory and jurisdictional" — *i.e.*, non-waivable —

(Cont'd)

motion or the other enumerated motions — including the motion filed by Irvin — before entry of judgment. *See* Fed. R. Civ. P. 58 2002 advisory committee's note ("Many of the enumerated motions are frequently filed before judgment is entered.").

9. The need for uniformity and certainty in the interpretation of Rule 4 is clear:

> [A]llowing courts to give different meanings from case to case allows them to expand and contract the scope of their own competence. That this is not envisioned is plain (if any citation is needed) from Rule 26(b) of the Federal Rules of Appellate Procedure, which specifically excepts from the courts' broad equitable power to "suspend the requirements or provisions of any of these rules in a particular case," Fed. Rule App. Proc. 2, the power to "enlarge the time for filing a notice of appeal."

Houston v. Lack, 487 U.S. 266, 279-80 (1988) (Scalia, J., dissenting) (Rehnquist, O'Connor, Kennedy joining).

are in fact better described as "inflexible claim-processing" rules — which, unless properly invoked, may be waived. 126 S. Ct. at 407. However, this Court made clear that the time periods in the federal rules are to be strictly applied whether those time periods are characterized as "jurisdictional" or as "inflexible claim-processing rules." *Id.* at 406-407.

Although *Eberhart* did not decide the issue, it appears that — as this Court has repeatedly stated — the Rule 4(a)(4)(A) appeal period provisions are mandatory and jurisdictional. *See, e.g., Browder*, 434 U.S. at 561; *Brickwood Contracts, Inc. v. Datanet Engineering, Inc.*, 369 F.3d 385, 392 (4th Cir. 2004). In either event, however, even if Rule 4(a)(4)(A) is a "claim-processing" rule, Southern Union properly invoked it in the Ninth Circuit, and its application — as *Eberhart* makes clear — is inflexible.

D. The Ninth Circuit's Reasoning For Rewriting Rule 4 Was Flawed

The Ninth Circuit declined to dismiss the appeal on the ground that when the July 28 Order was entered, "final judgment including the damages had not yet been entered." The court asked rhetorically: "What would Irvin have appealed?" (6a) Even assuming *arguendo* that such a supposed anomaly entitled the Ninth Circuit unilaterally to rewrite Rule 4 — which it does not — the court's reasoning, like its reference to *Alice in Wonderland* (6a), is flawed. There is no anomaly here, and any harsh result could have been avoided without overriding Rule 4's plain language.

First, to answer the Ninth Circuit's rhetorical question: before (or in the absence of) entry of final judgment, Irvin could have and should have appealed from the July 28 Order itself. Indeed, Rule 4(a)(4)(B)(ii) contemplates just such an

appeal: "A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A) . . . must file a notice of appeal. . . ." Here, the July 28 Order was a final appealable order under 28 U.S.C. § 1291. *See Hollywood v. City of Santa Maria*, 886 F.2d 1228, 1232 (9th Cir. 1989) ("[A]s is generally the case in the Rule 59 context, the order denying the motion for new trial definitively signal[s] the end of the litigation."). In this case, because the final judgment altered neither the jury verdict nor the July 28 Order, the mere fact that the final judgment was entered after the July 28 Order does not affect the finality of that order for purposes of appealability under 28 U.S.C. § 1291. *In re Slimick*, 928 F.2d 304, 308 (9th Cir. 1990) ("It is irrelevant that the court designated the first disposition an order and the later disposition a judgment. Appealability turns on the effect of the ruling, not the label assigned to it by the trial court.").

However, even assuming *arguendo* that the July 28 Order disposing of Irvin's post-trial Rule 50(b) and 59 motion were not appealable, Irvin, faced with Rule 4's plain language, could have and should have filed his motion *after*, not before, the entry of the final judgment. Under Fed. R. Civ. P. 50(b) and 59(b) and (c), motions under Rules 50(b) and 59 need only be filed "no later than 10 days after entry of judgment." Although there is no requirement that the post-trial motions enumerated in Rule 4(a)(4)(A) be filed after entry of the judgment, Irvin of course could have done so.

Alternatively, Irvin, after filing his post-trial motion before entry of judgment, could have and should have moved the District Court to extend his time to file his notice of appeal pursuant to Fed R. Civ. P. 4(a)(5).[10]

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10. Even without an extension, Irvin had nine days after entry of the judgment (August 19 through August 27, 2003) to file a notice of appeal on a timely basis.

Having failed to take either course of action, Irvin should not now be heard to complain about the consequences for his appeal of the plain language of Rule 4.

II. The Ninth Circuit Misapplied This Court's Decisions In Vacating The Punitive Damages Award

This Court has never before ruled on the constitutionality of a punitive award outside of the civil rights context against a public official who abuses his office and whose conduct causes actual and potential harm far exceeding the amount of compensatory damages. This Court's review of the Ninth Circuit's decision here would clarify, for the first time, the extent to which substantial punitive damages may, consistent with due process, be assessed against such a corrupt public official and the extent to which such actual and potential harm — including harm resulting from obstruction of the judicial process — may justify a punitive award.

These important issues are all the more ripe for this Court's review because, in vacating the punitive award here, the Ninth Circuit misapplied the governing standards set forth in this Court's decisions.

A. The Ninth Circuit Erroneously Focused On the Ratio Of Punitive To Compensatory Damages

Here, the Ninth Circuit vacated the $60 million punitive award on the ground that the ratio of punitive to compensatory damages of over 153 to 1 was too high. However, the Ninth Circuit ignored the fact that Irvin's misconduct in blocking the financially superior Southern Union offer caused at least $108 million in harm to Southwest shareholders — which would give rise to a ratio of punitive damages to actual harm of only 0.55.

The Ninth Circuit likewise ignored the fact that Irvin's misconduct caused even more enormous potential harm to Southern Union and Arizona consumers, as well as to the public interest. However, this Court has made clear that the constitutionality of a punitive award is measured not merely by the compensatory damages, but also by the other actual and potential harm caused by defendant's misconduct:

> [T]his Court [has] eschewed an approach that concentrates entirely on the relationship between actual and punitive damages. It is appropriate to consider the magnitude of the *potential harm* that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred.

TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 460 (1991) (emphasis in original). *See also State Farm Mut. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) (greater ratios may comport with due process where "a particularly egregious act has resulted in only a small amount of economic damages" or where the "injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine"); *BMW of North America v. Gore*, 517 U.S. 559, 582 (1996).

The Ninth Circuit paid lip service to the other harm caused by Irvin's conduct, noting certain of the components of the harm Irvin caused — but ignored the $108 million loss to Southwest shareholders, Southern Union's lost profits, and Arizona consumers' lost savings. Instead, focusing exclusively on the compensatory damages, the Ninth Circuit expressed shock at the ratio of 153 to 1. (19a)

However, had the Ninth Circuit followed this Court's mandate in *TXO* to compare the punitive award to all of the potential harm Irvin's conduct caused, the Ninth Circuit's shock surely would have "dissipate[d]," *TXO,* 509 U.S. at 462 (approving ratio of 526 to 1). Given Irvin's egregious conduct and the harm it caused, the 153 to 1 ratio entirely comports with due process requirements. As this Court stated in *TXO,* "[w]hile petitioner stresses the shocking disparity between the punitive award and the compensatory award, that shock dissipates when one considers the potential loss to respondents ... had petitioner succeeded in its illicit scheme." *Id.* at 462.

B. The Ninth Circuit Ignored The Fact That Irvin Was On Notice That His Reprehensible Misconduct Would Cause Enormous Harm

In *Campbell,* this Court made clear that due process is implicated in punitive damages awards because "elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." 538 U.S. at 417; *Gore,* 517 U.S. at 574.

Here, there can be no question that Irvin knew that abusing his public office and obstructing the judicial process — conduct he went to extraordinary lengths to try to conceal — would and should "subject him to punishment." There can also be no question that he knew of the magnitude of the actual harm his conduct would cause Southwest shareholders and of the non-economic harm to the public trust. As the District Court found, "Irvin's undisputed experience and knowledge made him aware of the potential enormous risks that his conduct would have in disrupting a multi-million dollar transaction." (62a)

The Ninth Circuit, however, erroneously failed to take into account that Irvin thus was at all times on notice that his conduct could — and indeed, should — give rise to a $60 million punitive award, if not more.

C. The Ninth Circuit Failed To Recognize That The Punitive Damages Award Was Justified By Irvin's Breach Of The Public Trust

The reprehensibility of a defendant's misconduct is "perhaps the most important indicium of the reasonableness of a punitive damages award." *Gore,* 517 U.S. at 575. If any misconduct is reprehensible, it is that of an elected official who abuses the trust of the very public he is charged with protecting. Overwhelming evidence at trial portrayed a defendant who, through a course of misconduct lasting many months, abused his position of trust, a position to which he was elected by the citizens of Arizona, to the detriment not only of plaintiff, but Southwest shareholders, Arizona consumers and the public at large. When that official sits in a quasi-judicial capacity, as this defendant did, the degree of reprehensibility is all the greater. To make matters worse, when an elected official sitting in a quasi-judicial capacity not only refuses to take responsibility for his misconduct, but seeks to obstruct justice by destroying and fabricating evidence, a jury is entitled to conclude, consistent with due process, that very significant punitive damages are necessary to deter that defendant (and others) from future misconduct.

Because Irvin's campaign against Southern Union involved both "repeated actions" and harm caused by "trickery or deceit", *Campbell*, 538 U.S. at 419 (quoting *Gore,* 517 U.S. at 575), it is a textbook case of the type of reprehensible conduct this Court has recognized warrants substantial punitive damages. Indeed, the very facts that were absent in *Gore* — "deliberate false statements, acts of affirmative misconduct, or concealment of evidence of

improper motive," 517 U.S. at 579 — are glaringly present here. Also, unlike in *Campbell*, where the defendant was being punished for acts in other jurisdictions — acts which were "dissimilar" and "independent from the acts upon which liability was premised," and which might have been lawful in those other jurisdictions, 538 U.S. at 422 — Irvin's punishment, as noted by the District Court (44a), was "premised on a series of events causing a single identifiable harm: disruption of the Southern Union-Southwest Gas merger" and on conduct not legal or proper anywhere.

In addition, ample evidence at trial — ignored by the Ninth Circuit — established that Irvin's misconduct caused harm to Arizona consumers that was not reflected in the jury's compensatory damages award. The cost savings from a Southern Union-Southwest merger would have been shared with Arizona ratepayers in the hundreds of millions of dollars. The District Court properly considered the loss of these benefits to consumers in assessing the punitive damages.

Particularly given that Irvin's reprehensible actions as a public official harmed the public trust, the District Court correctly relied upon numerous cases brought pursuant to 42 U.S.C. §§ 1981, 1983, in which courts have upheld significant punitive damages awards, even where compensatory damages are nominal, because "a violation of the public trust is itself a considerable, cognizable harm, though one without a definitive monetary value." (55a) The District Court persuasively noted the similarities between this case and civil rights cases. *See* 59a ("[T]he conduct here bears the hallmarks of a civil rights action, including an official acting under color of state law, intentional misconduct, and biased and differential treatment of parties before the [ACC] in ways that undermine due process and equal protection of the laws."). The District Court also appropriately noted, citing *Zarcone v. Perry*, 572 F.2d 52,

56-7 (2d Cir. 1978), that the "civil rights cases reflect a broader goal of deterring abuses of the public trust by public officials that is not limited to individual constitutional rights violations." (61a)

The Ninth Circuit held that the District Court was, however, "mistaken" in using punitive awards in civil rights cases as a "bench mark," because those cases address a "special area of public concern where affront to human rights" may require higher awards. (22a) The Ninth Circuit's reasoning is unpersuasive. Irvin's conduct implicates public concerns — including protection of the public trust in elected and judicial officials and prevention of obstruction of justice — that, while perhaps not precisely the same as those implicated in civil rights cases, are also of similar great and overriding importance.

Indeed, as the District Court also showed, punitive damages originally were developed specifically as a means to punish misconduct of public officials, particularly where the monetary or physical damage was limited. (53a) *See Lane County v. Wood*, 298 Or. 191, 200, 691 P.2d 473, 477 (1984) ("Historically, oppressive conduct by public offices was the situation where early judges were most prone to sanction exemplary damages, and by which they justified and rationalized the doctrine.") (quoting McCormick, *Damages* 288, § 81 (1935)); *Restatement (Second) of Torts* § 908, comment c ("[I]n the earliest cases in which punitive damages were allowed, the plaintiffs suffered no substantial harm, or at least no physical or financial harm appeared. These were the cases in which public officials were guilty of outrageously oppressive conduct"); Michael L. Rustad & Thomas H. Koenig, *Taming the Tort Monster: The American Civil Justice System as a Battleground of Social Theory*, 68 Brook. L. Rev. 1, 57 (2002) (early English courts "imposed these first exemplary damage awards against public officials who abused power in their official capacity").

This Court looks to such historical information in assessing punitive damages. *See, e.g., Gore*, 517 U.S. at 580-81. Nonetheless, the Ninth Circuit overlooked this information, summarily rejected the District Court's analysis, and thus inappropriately vacated the punitive damages award.

Finally, the District Court properly considered Irvin's persistent and egregious effort to conceal his misconduct. (42a-43a) Irvin's approach to defending himself in this action was to fabricate evidence, destroy documents and make false statements while testifying. This concealment and obstruction of justice — in and of itself — clearly deserved very severe sanction. *See, e.g., Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21-22 (1991) (citing "concealment" as a factor in awarding punitive damages).

In short, Irvin's conduct justified the jury's punitive award. That conduct was much more reprehensible than the defendant's conduct in *TXO*, where this Court approved a ratio of 526 to 1. Certainly, the courts should be careful, in accordance with this Court's decisions, to guard against excessive punitive damage awards that do not comport with due process. That clearly is not the case here, however, where the punitive award does comport with due process and those decisions. Indeed, punishing and preventing official and judicial misconduct — as the jury correctly sought to do here — itself vindicates constitutional concerns and values, including, in this case, as the District Court recognized (59a, 60a-61a), due process and equal protection. That the Ninth Circuit incorrectly rejected the award here, and rejected it so summarily, suggests that further guidance from this Court is appropriate.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — AMENDED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT ENTERED SEPTEMBER 16, 2005

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

423 F.3d 1117,
415 F.3d 1001

SOUTHERN UNION COMPANY,
a Delaware corporation,

Plaintiff-Appellee,

v.

SOUTHWEST GAS CORPORATION, a California corporation; ONEOK INC., an Oklahoma corporation; MICHAEL MAFFIE; THOMAS HARTLEY; GENE DUBAY; THOMAS SHEETS; JOHN GABERINO; JACK D. ROSE; EDWARD ZUB; LARRY W. BRUMMETT,

Defendants,

and

JAMES M. IRVIN,

Defendant-Appellant,

SOUTHERN UNION COMPANY,
a Delaware corporation,

Plaintiff-Appellant,

v.

SOUTHWEST GAS CORPORATION, a California corporation; ONEOK INC., an Oklahoma corporation; MICHAEL MAFFIE; THOMAS HARTLEY; GENE DUBAY; THOMAS SHEETS; JOHN GABERINO; JACK D. ROSE; EDWARD ZUB; LARRY W. BRUMMETT,

Defendants,

Appendix A

and

JAMES M. IRVIN,

Defendant-Appellee.

Nos. 03-16649, No. 03-16729

Argued and Submitted, May 10, 2005
July 13, 2005, Original Opinion Entered
Sept. 16, 2005, Amended Opinion Entered

Before: REINHARDT, NOONAN, and FERNANDEZ, Circuit Judges.

NOONAN, Circuit Judge:

James M. Irvin, a citizen of Arizona, appeals the judgment of the district court in favor of Southern Union Company, a Delaware corporation, on Southern Union's claims of tortious interference with a business expectancy and tortious interference with contractual relations, as a result of which Southern Union was ultimately awarded $390,072 in compensatory damages and $60,000,000 in punitive damages. Southern Union cross-appeals the district court's decision to keep its claim of lost profits from the jury.

We hold, first, that the appeals were timely filed; second, that the compensatory damage award should be affirmed; and third, that the punitive damages are constitutionally disproportionate to the harm found.

Jurisdiction. The case was brought by Southern Union under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961, and as a suit asserting diversity jurisdiction under 28 U.S.C. § 1332. In the course of the proceedings, various defendants settled with Southern

Union; the RICO claim dropped out; and only the business and contract torts went to the jury. In this court, our first question is the timeliness of Irvin's appeal; the timeliness of Southern Union's cross-appeal is dependent on our finding Irvin's appeal timely. We state the facts relevant to this issue.

On December 18, 2002, the jury returned its verdict in favor of Southern Union. The jury awarded damages of $975,181 on the contract claim, with 40% liability assigned to Irvin. The jury awarded $975,181 on the business relationship claim with 20% liability assigned to Irvin. The jury awarded $60 million in punitive damages. On January 9, 2003, Irvin moved for judgment notwithstanding the verdict (JNOV) or in the alternative for a new trial or remittitur. On January 24, 2003, the district court issued a ruling as to the proposed form of judgment, taking into account that the jury had assigned different percentages of responsibility to Irvin for the two torts for which the jury held him responsible. The court ruled that the two percentages should be averaged to determine Irvin's liability. On June 2, 2003, the district court denied Irvin's motion for JNOV. On July 28, 2003, the district court again denied Irvin's motion for JNOV and also his motion for a new trial or remittitur. This order, in its entirety, read:

> Pending before Court is Defendant Irvin's Amended Motion for JNOV or in the Alternative for New Trial or Remittitur. The Court has reviewed the briefing, and will deny the motion. A written opinion will follow early next week.

Accordingly,

IT IS ORDERED that Defendant Irvin's Amended Motion for JNOV or in the Alternative for New Trial or Remittitur is DENIED.

DATED this 25 day of July, 2003.

This order was communicated to counsel and docketed on July 28, 2003.

On July 31, 2003, the district court signed a second Order which dealt with Irvin's two post-trial motions, analyzed them in detail, and denied them. This order was docketed August 1, 2003.

On August 14, 2003, the district court signed what it termed "Final Judgment." It read, in its entirety, as follows:

> These consolidated actions came on for jury trial on October 29, 2002, the Honorable Roslyn O. Silver presiding. On December 18, 2002, all remaining matters having been duly tried and submitted to the jury, the jury rendered its verdict in matter CIV-99-1294-PHX-ROS. Judgment is hereby entered in favor of Southern Union Company and against Defendant James M. Irvin as follows: (1) On Southern Union's claim for intentional interference with contract, the sum of $975,181.46, adjusted by relative degrees of fault to $390,072.58; (2) On Southern Union's claim for intentional interference with business

> expectancy, the sum of $975,181.46, adjusted by relative degrees of fault to $195,036.29; (3) The higher amount of $390,072.58 constitutes the total actual damages assessed against Defendant Irvin, and in favor of Southern Union; (4) Punitive damages in the sum of $60,000,000.00; (5) Its cost of suit as taxed by the Clerk and as approved by the Court.
>
> DATED this 14 day of August, 2003.

This order was docketed August 18, 2003. Irvin's Notice of Appeal was filed August 29, 2003, within 30 days of the entry of this judgment.

Southern Union argues that Irvin was late; the appeal deadline was August 28, 2003, thirty days from the entry of the judgment of July 28. Southern Union relies on Federal Rules of Appellate Procedure (FRAP) 4(a)(4)(A), which reads as follows:

> (4) Effect of a Motion on a Notice of Appeal.
>
> (A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:
>
> . . .
>
> (v) for a new trial under Rule 59 . . .

Read literally, the rule applies. The district court on July 28, 2003 entered its order disposing of Irvin's motion for a new trial. The appeal period expired August 28, 2003.

We do not believe that the rule was intended to work in this way. On July 28, 2003, final judgment including the damages had not yet been entered. What would Irvin have appealed? In *Alice in Wonderland*, the rule is "Sentence first — Verdict afterwards." We could read our rule to mean Appeal first, Judgment afterwards. But we are not in Wonderland. Irvin's appeal was timely, as was Southern Union's, which was filed on September 12, 2003.

Having determined that we do have jurisdiction, we turn to the merits of the two appeals.

FACTS

James M. Irvin was elected in January, 1997 to be one of the three commissioners of the Arizona Corporation Commission (the ACC). This body regulates energy companies in Arizona and has the power to approve or disapprove mergers of such companies. Ariz. Rev. Stat. § 38-431; Ariz. Const. art. XV, 4-5. Irvin became chairman in November 1997 and served in this capacity until May 1999. Jack D. Rose was a lawyer and friend of Irvin and had worked on Irvin's campaign for election to the ACC. In June 1997, Irvin nominated him to be Executive Secretary of the ACC. Rose served in this capacity until December 31, 1998. Irvin and Rose became defendants in this case because of their relationship to the merger deliberations of Southwest Gas Company (SWG).

Appendix A

On December 14, 1998, SWG announced its agreement to merge with ONEOK, Inc., an appropriate acronym for One-Oklahoma, a leading Oklahoma natural gas company. The price offered by ONEOK was $28.50 per share of SWG stock. The parties agreed that a competing offer at a higher price would entitle SWG to consider the higher offer. On February 1, 1999, Southern Union offered SWG $32 per share on terms otherwise the same. The value of this offer was $108,000,000 over ONEOK's. If accepted, the deal would have created the largest natural gas utility in the United States. Any merger had to be approved by the ACC and by the appropriate regulatory authorities in California, Missouri, and Nevada.

On February 21, 1999, the SWG board unanimously determined that Southern Union's offer was a "Superior Proposal" as defined in the merger agreement with ONEOK. That determination meant that Southern Union's financial plan was "viable"; that "the deal was doable"; and that Southern Union could get regulatory approval. SWG was therefore free to negotiate with Southern Union. Irvin and Rose, however, worked to defeat Southern Union's proposal.

On December 28, 1998, Rose, still the Executive Secretary of the ACC, sent a business proposal to Prudential Securities, Inc. (PSI), a New York investment house and wholly owned subsidiary of the Prudential Insurance Company of America. Rose wrote: "Last week Southwest Gas Corporation announced that it is being bought out in an all cash transaction. Given my relationship with this company and my ability to advise them on important regulatory issues related to the merger, I believe that I am well positioned to

get some of the underwriting business." Neither Rose as a regulator nor PSI as an underwriter seemed aware of the implications of a regulator touting his ability to obtain business from a company within his jurisdiction.

On December 31, 1998, Rose resigned as Executive Secretary. On January 2, 1999, he was hired at the ACC by Irvin as a "Loaned Executive," without the knowledge or approval of other ACC commissioners.

On February 12, 1999, Irvin called Larry Brummett, chairman of ONEOK, and told him that he didn't want a bidding war between ONEOK and Southern Union and that he wanted to write SWG. A few days later, Rose, with Irvin's approval, traveled to Oklahoma and met Brummett. Brummett agreed that Rose could set up a meeting between representatives of PSI and ONEOK. February 23, 1999, the day after Southern Union's offer became public, Rose called PSI and told them that he was advising the chairman of ONEOK on the proposed merger and would arrange for PSI people to meet the CEO and CFO of ONEOK. On March 2, 1999, Rose met with John Gaberino, general counsel of ONEOK. The next day, Gaberino and Rose met with Irvin, who told Gaberino that Rose had given him a good report on ONEOK and that Irvin intended to contact the other two relevant regulatory bodies, the California Public Utilities Commission (the CPUC) and the Public Utilities Commission of Nevada (the PUCN). Two days later, March 5, 1999, Gaberino and another lawyer for ONEOK worked on a letter for Irvin to send to the board of SWG. Gaberino went over the text of this letter with Rose. This letter (the

Rose-Irvin letter) was to become an instrument in Irvin's interference with the proposed Southern Union merger.

On March 9, 1999, J. David Dubin of PSI sent an email to Joseph Sebastian Fichera, a managing director of the same company. This communication was titled "Referral Business Opportunity Through Jack Rose." Referring to Rose, Dubin stated:

> 3. Jack says that the Company's CEO has a strong motive for wanting to reward him presumably for his work in helping the Company obtain favorable regulatory action from the ACC during his tenure as its chief executive. He would like to pursue the Transaction on behalf of PSI and is confident that he can persuade the Company to name PSI as a managing underwriter.
>
> 4. Jack is concerned, however, about using up his goodwill with the CEO to obtain an engagement in which the fee income to IBG [= Investment Banking Group or underwriter] will be modest in comparison to the fees IBG would collect (and that he in turn would share) as an advisor on an acquisition. Hence, Jack has proposed that he and PSI enter into a finder's fee arrangement under which his contingent payout would be larger if he can deliver a more lucrative appointment for PSI. Specifically, he would propose the following percentage payouts of the fee income booked by IBG on the Transactions:

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A. For appointment as a Co-Manager. 15% of IBG fee income

B. For appointment as a Senior Manager 33% of IBG fee income

C. For appointment as Sole Manager 40% of IBG fee income.

. . .

6. Time is of the essence. Jack's telephone in Phoenix is 602-906-9007.

On March 10, 1999, Fichera passed this information on to another executive at PSI:

> A person we met on the Administrative Securitization trail in Arizona says he can help deliver a significant piece of business to us. The client, he told us today, is Oneok, a major midwestern gas company (Carol Coale does not cover them though she tracks them). We do not have a relationship with this firm (last WARP call date 5/95 from someone no longer here). It is an A rated company and someone we would like to do business with. He is willing to work completely on the come___no deliver, no pay. But, if he does deliver, he wants to be paid big time (see below).
>
> I think this is worth pursuing___it is real___ but need your guidance as to how much to compensate

if he really can deliver a senior managed or sole managed deal.

We need to get back to him on Thursday AM.

On March 19, 1999, Fichera, on behalf of Prudential Securities, and Rose entered into a contract providing as follows:

Dear Jack:

This letter is to confirm our mutual understanding with respect to compensation that may be payable to you from Prudential Securities Incorporated ("PSI") with respect to certain public offerings of securities underwritten by PSI.

You agree to introduce PSI to ONEOK, Inc. and U.S. West (each a "Company") and to assist PSI in securing the engagement of PSI by each Company (collectively, the "Introduction"). If during the next 24 months either Company consummates a public offering of its securities in which PSI acts as a managing underwriter (a "PSI Underwritten Offering"), PSI will pay to you a fee (the "Fee") based on a percentage of the management fee paid to PSI with respect to such

Appendix A

PSI Underwritten Offering according to the following schedule:

Capacity of PSI	*Percentage of Management Fee*
Co-Manager	15%
Lead Manager or Co-Lead Manager	30%
Sole Manager	35%

The Fee shall be paid to you within 30 days of the receipt of the management fee by PSI, provided that such Fee is not prohibited by law. PSI will only be obligated to pay you a Fee hereunder when the entire fee payable to PSI with respect to a PSI Underwritten Offering has been received by PSI free of adverse claim.

PSI shall reimburse you periodically for your reasonable, out-of-pocket travel and lodging expenses incurred with PSI's prior consent in connection with the Introduction.

Although only the proposed merger of ONEOK and U.S. West was referred to, this agreement, it could be inferred, was also to govern an ONEOK merger with SWG. A series of telephone calls between Rose and Irvin punctuated Rose's negotiations with PSI.

Rose and Irvin were at work even before Rose's contract was signed. In a memo dated March 16, Mark Dioguardi, a lawyer for ONEOK, had noted: ' Letter from one or more Chair would sink [Southern Union]." On that date, Irvin and

Rose were in San Francisco. Their trip was unknown to the ACC, and their expenses were not charged to it. In San Francisco they met with members and staff of the CPUC. According to Harvey Morris, who attended the meeting as counsel for the CPUC, Irvin and Rose together conducted a lobbying campaign for ONEOK. They presented the Rose-Irvin letter criticizing a SWG—Southern Union merger, stated that Southern Union would have to issue junk bonds to finance the merger, and added that Southern Union's debt-equity ratio would become 80-20. The meeting began and ended with Irvin and Rose urging the CPUC to send the Rose-Irvin letter to SWG. Everything said about Southern Union by the two Arizonans was negative.

On March 23, 1999, Irvin and Rose traveled to Reno, Nevada and the following day met with Judy Sheldrew, the chair of the PUCN. Irvin introduced Rose to talk about the SWG merger proposals. Rose told her that ONEOK was by far the superior candidate. Irvin urged her to have the Nevada commission issue the Rose-Irvin letter to SWG that he had urged upon the CPUC.

On March 25, 1999, Irvin and Rose met with Kenneth Guinn, the governor of Nevada and a former chairman of SWG. They urged him, too, to send a negative letter to SWG regarding Southern Union's offer. Governor Guinn declined to do so but, instead, called the CEO of SWG and advised him to "read between the lines" of the letter he would receive from Irvin. The Rose-Irvin letter was faxed to SWG by Irvin on April 5, 1999 from his office at the ACC. It was signed by him alone.

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April 5 was the same day the SWG board was to meet to discuss the competing merger offers. After faxing his letter, Irvin moved to Rose's home and from there called the CEO of SWG. Irvin told him that it was highly unlikely that a SWG-Southern Union merger would be approved by the ACC and that the California commission was equally concerned about that proposal. This telephone call was tape-recorded and played to the board of SWG. Copies of the Rose-Irvin letter were distributed to the board. Members of the board saw the regulators' position as a big problem in the way of accepting Southern Union's higher offer.

On April 12, 1999, Fichera of PSI and Rose met with officials of ONEOK, who indicated their readiness to do business with PSI. Thereafter Rose sent PSI an amendment to their agreement of March 19, 1999. Whereas the split of "any customary M&A advisory fee" on the ONEOK-U.S. West merger gave only 35% to Rose, the amendment proposed the split of the advisory fee on an ONEOK-SWG merger in this way: "2/3rds to Rose and 1/3rd to Prudential up to $3 million and 80% to Rose and 20% to Prudential for any fees in excess of $3 million." Rose's proposal was formally accepted by PSI in a contract signed by Fichera and dated June 22, 1999.

On April 26, 1999, SWG announced that it had rejected Southern Union's offer. The press release of SWG announced that its board "believes that Southern Union would have a more protracted and difficult time in obtaining regulatory approvals, extending eighteen months or longer." SWG went ahead with ONEOK.

Rose guided ONEOK through the regulatory process and was congratulated by ONEOK for his help. ONEOK prepared a $ 300 million debt offering to finance the merger with SWG. PSI was to be a manager of the underwriting. Rose, however, did not collect his commission. Shortly after Southern Union filed its complaint in this case in July 1999, ONEOK canceled the offering. After Southern Union had conducted discovery in this case and in the course of it gained knowledge of PSI's agreement with Rose on the fees he would earn, ONEOK withdrew entirely from the merger.

PROCEEDINGS

On July 19, 1999, Southern Union filed its complaint in this case. Its second amended complaint, filed July 25, 2000, was the operative basis of the trial. Before trial, on December 15, 2000, the district court dismissed the RICO claims on the ground that they constituted a securities fraud claim and were therefore barred by the Private Securities Litigation Reform Act of 1995, 18 U.S.C. § 1964(c).

In 2001, the multiple defendants moved for summary judgment. On January 4, 2002, the district court entered a comprehensive order disposing of these motions. We note the relevant rulings. (1) Granted was a motion to deny Southern Union the right to present a jury with evidence of its lost profits. (2) Denied was a motion for summary judgment by Jack Rose. The court observed that Rose had invoked his privilege against self-incrimination as to the matters at issue and that his invocation of the privilege in a civil suit left the fact-finders free to draw adverse inferences against him. (3) Denied was a motion for summary judgment

by ONEOK, the court ruling that "ONEOK's characterization of the evidentiary record is demonstrably false." After discovery and various motions, on October 29, 2002, a jury of nine was selected, sworn, and empaneled.

Prior to trial, an incident occurred that made a sharp impression on the district court and is best presented in the judge's own words as she reviewed Irvin's post-trial motion for remittitur: Irvin participated in a "scheme to impede the jury's search for truth at trial." The scheme involved his wife, Carol, fabricating notes of a telephone call of July 31, 1999, between herself and Jack Rose; in the conversation Rose appeared to exculpate Irvin from any charge of wrongdoing. Irvin gave the notes to his counsel, who presented them to the court. When counsel for Southern Union obtained the opportunity for its forensic examiner to inspect the notes, Irvin's counsel admitted that the notes were not contemporaneous with the telephone call but had just recently been written; he withdrew his proffer of the notes. Southern Union then moved to admit the notes as evidence of Irvin's intentional fabrication of evidence. The court granted the motion.

After nearly two months of trial, the jury returned its verdict. The subsequent proceedings and the appeals have already been noted.

ANALYSIS

Evidence supporting the verdict. Irvin continues to argue that he is entitled to JNOV because Southern Union failed to show that his efforts caused SWG to reject its offer. He

cites the testimony of a pair of SWG officers who had doubts about Southern Union's offer, but each of these witnesses tied their doubts to difficulties the regulators might raise. Some members of SWG's board did not think Irvin's interventions significant. Others did. That adverse inferences could be drawn against Rose has already been observed. Some of the strongest evidence from which the jury could draw inferences was the value ONEOK placed on Rose's services and relationship with Irvin as well as Rose's own high evaluation of his help after the April 5, 1999, meeting of the SWG board. Enough evidence was presented to the jury for it to find that Irvin caused at least 40% of the harm to Southern Union by interfering with its contractual relations; his interference was a significant cause. *Caudle v. Bristow Optical Co.*, 224 F.3d 1014, 1023-24 (9th Cir. 2000) (as amended) (citing *Wagenseller v. Scottsdale Mem'l Hosp.*, 147 Ariz. 370, 710 P.2d 1025, 1041 (Ariz. 1985)).

Irvin's scope of authority defense. Under Arizona law, a statute regulates claims against public employees such as Irvin. Ariz. Rev. Stat. § 12-821.01(A). It applies if the suit is against the employee in his public capacity and is directed to cases making claims against the employee's public employer. *Id.*

Irvin has found a decision of an intermediate Arizona court that he contends fits his case:

> [I]t is unnecessary for the claimant to sue the employer or file a notice of claim against either the individual public employee or the employer. Instead, in such a case the issue of whether the

> defendant was acting within the course and scope of his employment remains to be decided by the trier of fact, and a plaintiff who fails to file a notice of claim does so at his own risk. The parties have not reached the point in the proceeding at which it is appropriate to raise and decide the question whether the acts were done in the scope of Crum's employment, but it is clear that it cannot be resolved on a motion to dismiss. In any event, if the plaintiff does not file a notice, and the finder of fact concludes that the defendant was acting within the course and scope of his employment, the plaintiff cannot have judgment against the defendant.

Crum v. Super. Ct., 186 Ariz. 351, 922 P.2d 316, 318 (Ariz. Ct. App. 1996).

A majority of this court holds that, under the rule stated in *Crum*, Irvin was entitled to have the jury consider his defense that his actions were within the scope of his duties as a member of the ACC. Although the district court ruled that Irvin was not at all entitled to an instruction derived from *Crum*, the course and scope instruction that Irvin proposed was deficient under Arizona law and could have still been rejected. Despite this court's holding on the course and scope instruction, a different majority concludes that the instructional error was harmless. Assessing punitive damages of $60 million against him, the jury provided "a strong indication" that it disbelieved Irvin's account of what he was up to. *Larez v. Holcomb*, 16 F.3d 1513, 1518 (9th Cir. 1994). Southern Union's view of the facts, accepted by the jury,

was that Irvin's acts were connected with his official duties only as much as a judge accepting a bribe to decide a case in favor of the briber would be engaging in conduct connected to his duty as a judge. Large punitives are "evidence that an erroneous jury instruction was harmless." *See Swinton v. Potomac Corp.*, 270 F.3d 794, 806 (9th Cir. 2001), *cert. denied*, 535 U.S. 1018, 122 S. Ct. 1609, 152 L. Ed. 2d 623 (2002). In short, the award here "makes it quite plain" that the jury would have come to the same conclusion even if the *Crum* instruction had been given. *Lambert v. Ackerley*, 180 F.3d 997, 1009-10 (9th Cir. 1999) (*en banc*), *cert. denied*, 528 U.S. 1116, 120 S. Ct. 936, 145 L. Ed. 2d 814 (2000). Moreover the jury was instructed in detail about the scope of the ACC's authority and the duties inhering therein, and the jury nevertheless concluded that Irvin had acted improperly.

The punitive damages. Sixty million dollars in punitives after an award of compensatory damages against Irvin of $390,072! The ratio of over 153 to 1 immediately commands our attention. It cannot survive the constitutional scrutiny required by the Supreme Court. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003).

No bright line has been set beyond which punitives may not go. *Id.* at 425, 123 S.Ct. 1513. But we have been reminded that, under established principles, few awards exceeding a single digit ratio to a significant degree "will satisfy due process." *Id.* Even an award more than four times the amount of compensatory damages "might be close to the line of constitutional impropriety." *Id.* History points to double,

triple, or quadruple punitives; these ratios "are instructive." *Id.* In the light of these admonitions and suggested boundaries, we review the jury award and the judge's ruling sustaining it.

"'The most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.'" *Id.* at 419 (quoting *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996)). Briefed on *Campbell*, the district court properly looked first at this factor. The court found Irvin's conduct to be "marked by two factors: repeated actions and harm caused by intentional trickery and deceit." Irvin, the court stated, had abused his powers as a commissioner "in favor of the private interests of a specific utility company, ONEOK, and his personal interests. . . ." Harm to Southern Union was inflicted by Irvin by his letter and his telephone call to the April 5, 1999 board meeting of SWG and by his instigation of Governor Guinn's call. This actual harm was the culmination of two months of planning and activity directed to blocking the proposed Southern Union merger.

Irvin's purposeful persistence in this effort, the district court found, was matched by his efforts at concealment. As far as possible, his activities to block the merger were kept from his fellow commissioners, and, the court added, "afterwards he covered up his wrongdoing to ensure the outcome of the scheme."

When Southern Union challenged him and began litigation, Irvin's effort at concealment continued:

"he persevered in hiding his wrongful acts throughout the trial and in particular while testifying in Court before the jury." The court marked as "particularly egregious" Irvin's manufacture of evidence — the fabricated notes of his wife's telephone conversation with Rose, which Irvin persuaded his counsel (paid for him by the state of Arizona) to present as genuine to the court. The court found this "intentional fabrication of evidence" by Irvin to show his consciousness of guilt and to go to the reprehensibility of his conduct.

The district court noted that neither *Campbell* nor *Gore* considered reprehensible conduct by a public official. The court noted that significant consideration must be given to the nature of the public trust embodied in the public office the official held. The court noted the broad power of the ACC, which the Supreme Court of Arizona said was "treated as a fourth branch of government in Arizona." *Polaris Int'l Metals Corp. v. ACC*, 133 Ariz. 500, 652 P.2d 1023, 1029 (Ariz. 1982).

The court turned to the award of punitives in civil rights cases under 42 U.S.C. §§ 1981 and 1983 where the ratio of punitives to actual damages far exceeded a single digit ratio. Indeed nominal damages had been held sufficient to support the award of punitives against a public officer. *Gill v. Manuel*, 488 F.2d 799, 802 (9th Cir. 1973). In holding that municipalities are exempt from punitives in civil rights cases, the Supreme Court noted that effective deterrence was achieved by the assessment of punitives against the offending official. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 269-70, 69 L. Ed. 2d 616, 101 S. Ct. 2748 (1981). The

district court held that the single digit ratio was not the right measure from harm by a public official abusing his trust.

The district court was right in seeing reprehensible conduct by a public official as presenting an issue not addressed by *Gore* and *Campbell*. It was, however, we believe, mistaken in using awards in civil rights causes as a bench mark. The redress of racial, religious or gender discrimination has been treated as a special area of public concern where affront to human rights may require high punitives. *Zhang v. American Gem Seafoods, Inc.*, 339 F.3d 1020, 1043 (9th Cir. 2003), *cert. denied*, 541 U.S. 902, 124 S. Ct. 1602, 158 L. Ed. 2d 244 (2004). We do not believe that the civil rights case ratios apply to a case brought as a private tort action.

We do not mean to minimize the magnitude of Irvin's exploitation of his office. The jury was entitled to consider how he worked hand in glove with Rose and what this cooperation meant in securing for Rose 66-2/3% of the underwriting management fee up to $ 3 million and 80% of the fee beyond $ 3 million. That no payoff could be shown was because the grateful underwriter withdrew as this litigation went on. Nothing in Irvin's extraordinary efforts suggests that he was motivated only by a selfless desire to enrich Rose.

The failed plan to introduce fabricated evidence also did not bring a profit to Irvin, nor, since it failed, did it do any economic harm. Nonetheless, this shady strategy could appropriately enter the jury's calculation. *See United States v. Perkins*, 937 F.2d 1397, 1401-2 (9th Cir. 1991). In addition,

Irvin was observed at his ACC office destroying documents subpoenaed by the plaintiff, and his secretary had her hard drive reformatted. In court, Irvin repeatedly denied evidence of his misconduct, to the extent that the district court found his testimony to be part of his reprehensible conduct. As his document destruction was incomplete and as his words under oath did not convince the jury, no economic harm was done by them. They were grave injuries to the judicial process.

To sum up our view of the punitives, the ratio to actual damages is too high. The noneconomic damage to the judicial process and the exploitation of high public office were properly taken into account. We vacate the award, remanding for the district court to offer the option of a remittitur or a new trial on the punitives. We leave to the discretion of the district court the ratio to be set if it orders remittitur.

Southern Union's appeal. The district court found that Southern Union offered "insufficient evidence to establish the terms of a consummated merger with Southwest." Although Southern Union points to evidence to the contrary, we are unwilling to reverse the well-informed trial judge on this close question, especially as a new trial on the alleged lost profits would, at most, lead to the award of damages not likely to be collected.

Conclusion. The award of punitive damages is vacated and this issue is remanded to the district court with instruction to order a remittitur or a new trial on this issue. The judgment against Irvin for compensatory damages is affirmed. Southern Union's cross-appeal is denied.

Appendix A

03-16649—Affirmed in part, vacated in part, and remanded.

03-16729—Affirmed.

FERNANDEZ, Circuit Judge, Concurring and Dissenting:

I dissent in part because I believe that a new trial is required, although, as I will note, I also concur in part because I do agree with certain portions of the majority opinion.

A. *Jurisdiction*

I do agree with the majority's pithy opinion that we have jurisdiction over this appeal and that a contrary rule would approach parody. Still and all, at the risk of being unduly prolix, I will say a few more words about my reasons for agreeing on this issue.

The problem we are faced with is the plain language of Fed. R. App. P. 4. While it is usually thought that a party's time to file a notice to appeal does not start to run until a judgment is filed, the rule itself does not say so on its face. Its plain language states that the time starts to run upon the entry of the judgment appealed from except as provided in

Rule 4(a)(4). *See* Rule 4(a)(1)(A). But Rule 4(a)(4)(A) says that the time runs from the date that certain posttrial motions are decided (entry of an order disposing of them). The plain language suggests that even if no judgment has been entered, the time starts to run when the motions are decided. Like the majority, I do not think that reading can be accepted. Why?

Pursuant to 28 U.S.C. § 1291, our jurisdiction extends to final decisions only. Thus, until there is a final decision, we cannot take jurisdiction over a case. But a party cannot have a final decision to appeal from until one is entered. (True, a party might file a notice of appeal earlier, but it is not effective. It is simply saved under Rule 4(a)(2)). Thus, the plain reading would lead to the possibility that pursuant to Rule 4(a)(4)(A) the time to file a notice to appeal would run out before there was a final judgment over which we could take jurisdiction.[1] That seems peculiar, not to mention unjust. *See Clinton v. City of N.Y.*, 524 U.S. 417, 428-29, 118 S. Ct. 2091, 2098, 141 L. Ed. 2d 393 (1998); *Pub. Citizen v. United States Dep't of Justice*, 491 U.S. 440, 452-55, 109 S. Ct. 2558, 2566-67, 105 L. Ed. 2d 377 (1989); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527-28, 109 S. Ct. 1981, 1994-95, 104 L. Ed. 2d 557 (1989) (Scalia, J., concurring); *Or. Natural Res. Council, Inc. v. Kantor*, 99 F.3d 334, 339 (9th Cir. 1996). Similarly, if Southern Union were correct, the time for a notice to appeal would begin to run before there was a final judgment (final decision) from which an appeal to us could actually be taken. Thus, we cannot rely on the plain language alone.

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1. In general, a judgment is the equivalent of a final decision. *See Bankers Trust Co. v. Mallis*, 435 U.S. 381, 384 n.4, 98 S. Ct. 1117, 1119 n. 4, 55 L. Ed. 2d 357 (1978).

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If we resort to common sense, that tells us that the idea of being forced to appeal a judgment before there is a judgment to appeal is rather incoherent. That would suggest that the possibility was never considered and that Rule 4(a)(4) was designed to extend, not limit, the appeal time set forth in Rule 4(a)(1). Not surprisingly, if we resort to the Advisory Committee notes, we can divine that they speak to the idea of postponing the notice of appeal while the motions in question are pending and mandate that one should await the decision of those. *See* Rule 4, Advisory Comm. Notes (1979 Amendment, Subdivision (a)(4)). They also look upon Rule 4(a)(4)(A) as tolling the running of or extending the time to appeal. *See id.* (1993 Amendment, Note to Paragraphs (a)(1), (a)(4)).

It must be acknowledged on the other hand that Rule 4(b), which deals with criminal appeals, explicitly addresses the possibility that a judgment might be filed after certain motions are disposed of and then proceeds to declare that the time runs from the entry of the decision on the motions or entry of the judgment, whichever is later. Rule 4(b)(3). That suggests that the Rules Committee knew how to deal with the problem we face here, if it thought about it and wanted to do so. But, again, the Committee Notes regarding that provision indicate a concern that because of the unique structure of the criminal rules, the motions might actually be decided before a judgment was entered. The Committee wanted to avoid the absurdity of having the notice to appeal time run before entry of the judgment. *See* Rule 4, Advisory Comm. Notes (1993 Amendment, Note to Subdivision (b)). That rather underscores the fact that the issue was never even contemplated for a civil case like ours. In fact, the Committee

stated that the problem in the criminal area was that, unlike a civil case, the time to make a motion could start running before there was an entry of judgment. *Id.* The rule responded to the mention of that difficulty in an earlier case. *See United States v. Hashagen*, 816 F.2d 899, 902 n.5 (3d Cir. 1987). Unfortunately, nobody had noted the problem for civil cases; nobody even contemplated it.

All of the above being so, I agree with the majority on the jurisdiction issue.

B. *Merits*

I also agree with the majority that there was sufficient evidence from which a jury could hold in favor of Southern Union. Much of that is detailed in the majority opinion. Where we part company is on the question of whether the verdict can be upheld in light of the district court's failure and refusal to give the scope of employment instruction requested by Irvin.

In my view, Southern Union's failure to give the notice required under Arizona Revised Statutes § 12-821.01(A) would be fatal to its case, if Irvin was, indeed, acting within the scope of his employment. *Crum v. Superior Court*, 186 Ariz. 351, 922 P.2d 316 (Ariz. Ct. App. 1996), makes that clear. As *Crum* puts it: "In any event, if the plaintiff does not file a notice, and the finder of fact concludes that the defendant was acting within the course and scope of his employment, the plaintiff cannot have judgment against the defendant." *Id.* at 318.

If a plaintiff for some reason decides not to protect itself by filing an appropriate notice, that is fine, but the plaintiff then proceeds at its own peril if, as it turns out, the state officer or employee in question was acting within the scope of his employment. In that instance, the plaintiff's gamble is indeed parlous because it is not even necessary that the employee have acted from motives which are entirely and purely public service oriented, as long as at least a part of the employee's purpose was to serve his master's needs and ends. *See Smith v. Am. Express Travel Related Servs. Co., Inc.*, 179 Ariz. 131, 876 P.2d 1166, 1170-71 (Ariz. Ct. App. 1994).

That said, Irvin was surely entitled to have a jury consider whether his actions were within the scope of his employment; if they were, due to Southern Union's failure to give the required statutory notice, a judgment could not have been rendered against him. Thus, the district court did err, but was the error prejudicial? *See Jenkins v. Union Pac. R.R. Co.*, 22 F.3d 206, 210 (9th Cir. 1994). I think it was. In my view, we cannot say that it is more probable than not that the error was harmless. *Id.*

No doubt there was evidence from which the jury could decide that Irvin was entirely outside the scope of his employment, but there was contrary evidence also. Irvin held an important elected position as a commissioner of the Arizona Corporations Commission, which regulates energy companies in Arizona, among other things.

The Commission and its members are vested with very broad authority in their quest to benefit the public weal. In

fact, the scope of the Commission's power and authority is so extensive that it has sometimes been dubbed the fourth branch of the government of Arizona. *See Ariz. Corp. Comm'n v. Superior Court*, 105 Ariz. 56, 459 P.2d 489, 493 (Ariz. 1969). As to public service corporations, those powers include the setting of rates, the issuing of rules and regulations, the inspection of books and records, the receipt of reports, the conduct of investigations, and even the imposition of fines. *See* Ariz. Const. art. XV, §§ 3, 4, 13, 19; *see also* Ariz. Rev. Stat. § 40-202; *Ariz. Corp. Comm'n v. State ex rel. Woods*, 171 Ariz. 286, 830 P.2d 807, 811-15 (Ariz. 1992) (detailing the provenance and history of the Commission and its power). And there can be no doubt that investigative authority, including the taking of evidence under oath, is conferred upon "each commissioner." Ariz. Rev. Stat. § 40-241.

In this case, the jury had evidence before it from which it could have determined that Irvin's actions, though misguided, were designed to further the interests of the Commission and of the State. He testified that, as he saw it, the Constitution gave him investigative powers, as it surely did. He also stated that he saw no reason why he should not share his concerns with others. His position was not simply to act as a judge; he was an investigator, an elected public official in high office, and a person who could be expected to be much more active than judges are. Furthermore, it is apparent that Irvin, rightly or wrongly, saw Southern Union as a rather undesirable company which, due to its capital structure and history, would no doubt try to save money by terminating many current employees of Southwest Gas and by degrading customer service. He was of the opinion that

the company had done something like that in another state. Moreover, there was evidence that others had the same view.

In addition, in Irvin's opinion, and there is nothing to the contrary, it was proper for an Arizona commissioner to speak to his counterparts (and others) in other affected states and to try to develop what he thought of as a regional approach to regulatory problems. It is not surprising that he advocated his view of the matter when he did so. Finally, while one can be cynical about Irvin's motivations,[2] he expressly testified that he was never promised anything of value for his activities. There is *absolutely no evidence* that he was.

Let me be clear. I do not intend this opinion to be an elogium; I do not say that Irvin's behavior deserves encomiums, but, whatever his failings, the evidence does not require the conclusion that he is a rapscallion. It should not come as a surprise to discover that a government official thought he was fulfilling the demands (or purposes) of his office when he behaved in a distasteful manner. If Irvin thought he was fulfilling the purposes of his position and acted for that reason, he surely would not be the first governmental official, even in recent times, who thought he was acting to benefit the public but did so in ways that were unacceptable, improper, and even frightening. I will leave examples of the always renascent challenges to good government in a truly free society to the memory, knowledge and intelligence of the reader.

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2. Can anybody trust a person who attempts to conceal, manufacture, and manipulate evidence after a lawsuit starts?

In fine, under Arizona law at least, the evidence does not necessarily, or even particularly, show that Irvin was outside the scope of his employment when he took the actions in question here. More specifically, a jury could find that he was very misguided, but was still acting to further the interests and purposes of his employer.[3] The failure to give the jury an opportunity to so decide was prejudicial error.

Did Irvin behave as he should? Of course not; the jury has told us that. Was Irvin's conduct bad enough to deserve punishment? Of course; the jury has told us that also. But was Irvin actually flagitious? We do not know; the jury was not asked to decide that question. I would reverse and remand for a new trial.[4]

Thus, I respectfully concur in part and dissent in part.

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3. In fact, under 42 U.S.C. § 1983, we often encounter a public officer who is acting within the scope of his employment and who has violated another person's sacred constitutional rights knowingly or by plain incompetence. *See Anderson v. Creighton*, 483 U.S. 635, 638, 107 S. Ct. 3034, 3038, 97 L. Ed. 2d 523 (1987); *see also Saucier v. Katz*, 533 U.S. 194, 201-02, 121 S. Ct. 2151, 2156, 150 L. Ed. 2d 272 (2001).

4. I agree with the majority's conclusion that the punitive damage award cannot stand, although, again, if Irvin was acting within the scope of his employment, no award whatsoever would be justified.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA ENTERED JULY 28, 2003

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

SOUTHERN UNION COMPANY,
a Delaware corporation,

Plaintiff,

v.

SOUTHWEST GAS CORPORATION,
a California corporation, et al.,

Defendants.

CV-99-1294-PHX-ROS

July 25, 2003, Dated
July 28, 2003, Entered

ORDER

Pending before Court is Defendant Irvin's Amended Motion for JNOV or in the Alternative for New Trial or Remittitur [Doc. #2238]. The Court has reviewed the briefing, and will deny the motion. A written opinion will follow early next week.

Accordingly,

IT IS ORDERED that Defendant Irvin's Amended Motion for JNOV or in the Alternative for New Trial or Remittitur [Doc. #2238] is **DENIED**.

DATED this 25 day of July, 2003.

s/ Roslyn O. Silver
-Roslyn O. Silver
United States District Judge

APPENDIX C — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA ENTERED AUGUST 1, 2003

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

281 F. Supp. 2d 1090

SOUTHERN UNION COMPANY,
a Delaware corporation,

Plaintiff,

v.

SOUTHWEST GAS CORPORATION,
a California corporation, et al.,

Defendants.

CV-99-1294-PHX-ROS

July 31, 2003, Decided
August 1, 2003, Entered

OPINION

SILVER, *District Judge*.

On December 18, 2002, after a jury trial of nearly two months, the jury returned a verdict for Plaintiff Southern Union Company against Arizona Corporation Commissioner James Irvin, the only remaining Defendant at the conclusion of trial, and assessed a punitive damages award of $60,000,000. Southern Union prevailed on two causes of

action, intentional interference with business expectancy and intentional interference with contractual relations, both arising from Irvin's activities generally in 1999 which caused the failure of an attempted merger between Southern Union and Southwest Gas Corporation. At the time of both the attempted merger and the jury verdict, Irvin held elective office as a Commissioner on the Arizona Corporation Commission. He has filed an Amended Motion for JNOV or in the Alternative for New Trial or Remittitur [Doc. # 2238], seeking a new trial or remittitur on the punitive damage award of $60,000,000.

Following the Supreme Court's decision in *State Farm Mutual Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003) (*Campbell*), the parties submitted supplemental briefing on the issue of punitive damages: Commissioner Irvin's Supplemental Memorandum of Law [Doc. # 2244], Southern Union Company's Response [Doc. # 2245], and Commissioner Irvin's Reply [Doc. # 2246]. Following a hearing on June 2, 2003, the Court ordered further supplemental briefing, and both Southern Union [Doc. # 2253] and Commissioner Irvin [Doc. # 2254] submitted additional memoranda. Having considered the briefing of the parties, Commissioner Irvin's motion will be denied, and the punitive damages award of $60,000,000 assessed by the jury will be upheld.

Appendix C

Analysis

A. Punitive Damages under Arizona Law

Commissioner Irvin's initial argument is that there is insufficient evidence to sustain an award of punitive damages under Arizona law. "To recover punitive damages, the plaintiff must . . . introduce sufficient evidence to allow the trier-of-fact to calculate a punitive damage award that is reasonable under the circumstances." *Hawkins v. Allstate Ins. Co.*, 152 Ariz. 490, 497, 733 P.2d 1073, 1080 (Ariz.1987). *Hawkins* specifies three non-exclusive factors that the Court should consider in evaluating an award of punitive damages: the financial position of the defendant, the nature of the defendant's conduct, and the profitability of the defendant's conduct. *Id.* at 501-2, 733 P.2d 1073. *See also Hyatt Regency Phoenix Hotel Co. v. Winston & Strawn*, 184 Ariz. 120, 134, 907 P.2d 506, 520 (Ariz.App.1995) (outlining and applying three *Hawkins* factors). "A plaintiff is not required to put on proof of every factor, nor is any single factor a prerequisite to recovery of punitive damages. Rather, the plaintiff must produce evidence so that the amount awarded may not be said to be so unreasonable in regard to the circumstances as to show the influence of passion or prejudice." *Hawkins*, 152 Ariz. at 501, 733 P.2d 1073 (quotations and citations omitted). The Court must show considerable deference to the judgment of the jury:

> We vest the trier-of-fact with discretion to award an amount of punitive damages that, in its judgment, will punish the defendant and serve as an example to deter similar future misconduct.

> Once exercised, this discretion should not be disturbed unless the award is the result of passion or prejudice. The appropriate test of passion or prejudice is whether the verdict is so manifestly unfair, unreasonable, and outrageous as to shock the conscience of the court. *The amount of the award alone is not sufficient evidence to prove the jury acted with passion or prejudice.*

Hawkins, 152 Ariz. at 501, 733 P.2d 1073 (quotations and citations omitted) (emphasis added).

The first consideration is the financial position of the defendant. *Hawkins*, 152 Ariz. at 497, 733 P.2d 1073. "It is axiomatic that the wealthier the wrongdoing defendant, the greater the award of punitive damages necessary to punish him. We recognize, however, that the award must not financially kill the defendant." *Id.* at 501, 733 P.2d 1073.

Irvin argues that the punitive damages award in this case must be overturned because it would "financially kill" him based on the evidence that Southern Union introduced at trial. At trial, Southern Union produced evidence of one financial statement of Irvin's and his wife's assets (Exhibit 435) which reflected that on an undisclosed date they had $859,000 in assets, excluding Irvin's interests in his family's business. Tr. at 4770-71. On cross-examination, Irvin conceded that he had stock in the family business but claimed to have no knowledge of how much the stock or the company was worth. Tr. at 4762. Later, Irvin claimed, without any offer of proof or substantiation, that his individual net worth was "considerably less" than that reflected on the joint financial statement. Tr. at 4821.

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Southern Union, however, presents case law establishing that the burden is *on Irvin* to show that the verdict would actually financially destroy him. In Arizona, "there is no requirement that specific financial circumstances be presented. A defendant who has not introduced evidence of his financial circumstances many not complain of its absence." *Asphalt Engineers, Inc. v. Galusha*, 160 Ariz. 134, 138, 770 P.2d 1180, 1184 (Ariz.App.1989). *See also Nienstedt v. Wetzel*, 133 Ariz. 348, 357, 651 P.2d 876, 885 (1982) (holding that "a defendant may not complain of the absence of evidence of his wealth when he has made no effort to introduce such evidence"); *Hawkins*, 152 Ariz. at 501, 733 P.2d 1073 ("A plaintiff is not required to put on proof of every factor, nor is any single factor a prerequisite to recovery of punitive damages. *See Nienstedt v. Wetzel*, 133 Ariz. at 357, 651 P.2d at 885 (evidence of defendant's wealth not required to recover punitive damages).") (citation in original). Further, Arizona courts have held that "the sole fact that an award exceeds a defendant's present assets" is not sufficient grounds for setting it aside. *Puz v. McDonald*, 140 Ariz. 77, 79, 680 P.2d 213, 215 (Ariz.App.1984).

Irvin presented no evidence that the award would actually financially destroy him. The only evidence of his net worth in the record was offered by Southern Union. Irvin disputed the amount by merely testifying that the evidence was not accurate. Without corroboration of this statement and other evidence, Irvin has waived his right to complain of his absence of wealth.

The second consideration in assessing the award of punitive damages is "the nature of the defendant's conduct,

including the reprehensibility of the conduct and the severity of the harm likely to result, as well as the harm that has occurred, from the defendant's conduct." *Hawkins*, 152 Ariz. at 497, 733 P.2d 1073. More particularly, "[t]he more reprehensible the act and the more severe the resulting harm, the greater the award of punitive damages that is reasonable under the circumstances. The duration of the misconduct, the degree of defendant's awareness of the harm or risk of harm, and any concealment of it are elements to consider in judging the reprehensibility of the defendant's conduct." *Id.* at 497, 733 P.2d 1073.

Irvin argues that his conduct was not reprehensible, because it took place over a short period of time (two months) and resulted in only economic injuries. Further, Irvin argues that any concealment of his activities should not be considered because the concealment itself was not the proximate cause of the injury. Irvin's first objection is meritless, because Southern Union presented evidence at trial of a determined effort, over a number of months, to disrupt the Southern Union-Southwest Gas merger. The evidence also showed that during this time, Irvin abused his privileges as a Corporation Commissioner to attempt to disrupt the deal, while purposely concealing his activities from the Commission. Additionally, Irvin was acutely aware of the risk of harm to Southern Union, a fact which the jury clearly found in order to find him liable of an intentional tort and award an impressive amount of punitive damages. Southern Union accurately argues that this type of conduct should be severely deterred, which is a key purpose of an award of punitive damages. Finally, the concealment is also an "element[ ] to consider in judging the reprehensibility of [Irvin's] conduct." *Hawkins*, 152 Ariz. at 497, 733 P.2d 1073.

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Irvin's concealment *is* relevant to determining the degree of reprehensibility. Irvin relies on *Saucedo v. Salvation Army*, 200 Ariz. 179, 24 P.3d 1274 (Ariz.App.2001), in which the Court of Appeals overturned an award of punitive damages where the requisite evil mind was inferred from a motorists' flight from the scene of an accident after he negligently struck and killed a pedestrian. The Court held that the flight was not the proximate cause of the injury, and therefore was not a basis for punitive damages. However, in *Saucedo*, the flight had very little relevance to whether the motorist committed the tort with an evil mind because it occurred after the tort was completed, and the flight did not proximately cause the injury because the victim would have died whether or not the motorist had stopped. In this case, the evidence of concealment clearly bears upon whether Irvin had the required mental state of intent to commit the tortious acts. Further, it directly relates to Irvin's ability to undercut the merger while avoiding any public scrutiny anticipated in his role as a public official with significant authority to affect the decision of which company merged with Southwest Gas. The concealment was part of Irvin's pattern of activities constituting the legal "proximate cause" of the injury. The jury was instructed on proximate cause in accordance with Arizona law. Instruction No. 28 [Doc. # 2196] reads, "Before you can find James Irvin at fault, you must find that his conduct was the cause of Southern Union's injury. To find that James Irvin's conduct caused Southern Union's injury, Southern Union must prove that Southwest Gas Corporation would not have breached its contract with Southern Union, and/or terminated Southern Union's business expectancy in acquiring Southwest Gas, but for the conduct of James Irvin." By virtue of the verdict, the jury found Irvin's conduct was the proximate cause of both torts.

The final *Hawkins* factor, the profitability of Irvin's conduct to himself, is not relevant here. There was evidence, however, that he would have been personally advantaged by a merger with ONEOK. First, there was reliable evidence that the management of Southwest Gas preferred ONEOK as a merger partner over Southern Union. Further, the evidence supported the inference that Irvin perceived that his allegiance to the management of Southwest Gas would enhance his political career. Apart from this, it is not necessary, to support an award of punitive damages, that Southern Union prove that Irvin personally profited from his tortious actions. *Hawkins*, 152 Ariz. at 501, 733 P.2d 1073. Therefore, the award of punitive damages is not in violation of or inconsistent with Arizona law.

B. Due Process

Following recent Supreme Court precedents, the Court must determine whether the punitive damages award is constitutional as a matter of due process. In 1996, the Supreme Court decided *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 568, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996) (*Gore*), which established that punitive damage awards may be so "grossly excessive" as to "enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment." In *Campbell*, 538 U.S. at __ - __, 123 S.Ct. at 1520-21, the Supreme Court held unconstitutional a $145 million punitive damages award based on a compensatory damage award of $1 million. In doing so the Court reaffirmed that trial courts must consider the three central "guideposts" first specified in *Gore*: the degree of reprehensibility of the defendant's misconduct, the disparity between actual or

potential harm suffered by the plaintiff and the punitive damages award, and the difference between punitive damages and civil or criminal penalties authorized or imposed in comparable cases. To determine whether the $60 million award is unconstitutionally excessive, the Court must examine each guidepost.

(1) Degree of reprehensibility

"[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Campbell*, 538 U.S. at __, 123 S.Ct. at 1521 (quoting *Gore*, 517 U.S. at 575, 116 S.Ct. 1589). The Court in *Campbell* listed five factors to consider in determining the reprehensibility of a defendant's conduct: "the harm caused was physical rather than economic, the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident." *Campbell*, 538 U.S. at __, 123 S.Ct. at 1521. The Court clarified that "[t]he existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." *Id.* at 1521.

In this case, the degree of reprehensibility of Irvin's conduct is marked by two factors: repeated actions and harm caused by intentional trickery and deceit. As discussed in the previous section, Irvin's tortious actions were planned and perpetrated over a number of months, and were not

singular or isolated attempts to disrupt the merger, even if the rejection of the merger occurred at only one Board meeting. Also, the harm was the result of Irvin's intentional conduct, which the jury determined was accomplished with an evil mind, manifested by deception and trickery. Irvin was in a vital position to influence the Southwest Gas Board of Directors on which company would merge with Southwest Gas. As established at trial Irvin, as a Corporation Commissioner, had quasi-judicial responsibilities, requiring scrupulous honesty and neutrality in his dealings with all merger candidates, and in his serving the best interests of the public. "To be sure, infliction of economic injury, especially when done intentionally through affirmative acts of misconduct . . . can warrant a substantial penalty." *Gore*, 517 U.S. at 576, 116 S.Ct. 1589. Though striking down a punitive damages award, the Court in *Gore* was careful to distinguish the facts in Gore from cases such as this one. "[T]he record in this case discloses no deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive, such as were present in *Haslip* and *TXO*." *Id.* at 579, 116 S.Ct. 1589 (citing *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991) and *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993)). In contrast, the record in this case discloses all of these factors.

Most of the Supreme Court's analysis of reprehensibility in *Campbell* is simply inapplicable to this case. *Campbell* and *Gore* were primarily concerned with a defendant being punished for actions it took in other states, particularly when those actions may have been lawful if they took place in other

states. *Campbell*, 538 U.S. at __ - __, 123 S.Ct. at 1521-23. While *Campbell* does indicate that "[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the reprehensibility analysis," the Court's primary concern is that "[a] defendant's dissimilar acts, independent of the acts upon which liability was premised, may not serve as the basis of punitive damages." *Id.* at 1523. Apart from this, Irvin's liability is premised on a series of events causing a single identifiable harm-disruption of the Southern Union-Southwest Gas merger. Nor does this *Campbell* guidepost foreclose a consideration of Commissioner Irvin's concomitant breach of the public trust by disrupting the merger. Certainly, Irvin's ignoble neglect of the public trust, that was inextricably related to his disruption of the merger may be considered by the Court on the issue of reprehensibility.

There is significant convincing evidence supporting the jury's decision to return a verdict assessing punitive damages and awarding the amount chosen. Elaborating on what was previously alluded to, Commissioner Irvin is vested with immense powers founded in the Constitution of the State of Arizona, and the people who elected him to this public office had faith that he would engage his authority fairly and in accordance with the law. The evidence shows and the jury found that he abused those powers in favor of the private interests of a specific utility company, ONEOK, and his personal interests, by intentionally and deceptively participating in dissuading the Southwest Gas Board from adopting a plan to merge with Southern Union. Apparently because of the wrongdoing, he concealed his activities from

his fellow Commissioners and the public during such activities, and afterwards he covered up the wrongdoing to ensure the outcome of the scheme. Finally, he persevered in hiding his wrongful acts throughout the trial and in particular while testifying in Court before the jury.

A particularly egregious act of reprehensibility occurring during trial was the evidence that Irvin was involved in the attempted proffer of fabricated evidence, again demonstrating that he would persist in refusing to take responsibility for his behavior. On October 24, 2002, the week before trial began in the late evening, Irvin's counsel informed the Court that new evidence had been discovered and would be offered at trial. This evidence included two pages of notes written by Carol Irvin dated "7-31-99." The notes described a telephone conversation between Carol Irvin and Defendant Jack Rose allegedly occurring on July 31, 1999. Irvin's counsel represented that the notes were taken "contemporaneously" with the 1999 conversation. The content of the notes emphatically indicated that Rose, an assistant to Irvin at the time of the failed merger, told Carol Irvin that he was principally involved in working on the merger while "Jim [Irvin] not involved." The truncated notes continued, in part, to further exculpate Irvin with allegations of Rose's remarks that "Jim [Irvin] did nothing wrong-Jack working with others to bring Oneok to AZ. Jim not involved-trusted Jack to do research . . . Jack did a lot without Jim knowing cuz Jim busy at Commiss. Jack working in AZ Best interest. When will Jim be home-Jack needs to tell Jim s-o-o much he doesn't know! . . . Call me anytime! I'm there for you! Don't worry-we did nothing wrong." Further, and not appearing to be merely coincidental, the notes were written

on the back of unrelated documents dated March 30, 1998 and April 8, 1998.

Adding to the suspicion, Irvin's counsel said that Carol Irvin also gave counsel a statement of her recollection of a meeting between Commissioner Kunasek and Irvin also occurring in 1999. Significantly, the statement was represented to have been authored by her one week before trial. Conspicuously, this statement was not drafted on paper with the printed date of 1998. Further, the notes of her conversation with Rose were styled in short, chopped phrases as if hurriedly written. In contrast, the statement of her recollection of the 1999 meeting was written in complete sentences which logically flowed from one topic to the next and was not written with on paper with the printed 1998 on the back.

Irvin's counsel further represented that Carol Irvin had disclosed to him the existence of the notes and the statement the day before, October 23, and had provided them to him on October 24. After this revelation, the Court ordered Irvin's counsel to produce the notes and the statement for inspection by Plaintiff's and Rose's counsel. On October 31, 2002, in open Court and in the presence of Irvin and/or Irvin's counsel, Plaintiff's counsel requested an opportunity for Plaintiff's forensic examiner to examine the notes and the Court granted the request. The next day, on November 1, 2002, counsel for Irvin contacted the Court at approximately noon and requested an emergency hearing that was held in the afternoon of the same day. Irvin's counsel explained that a meeting with Carol Irvin and Commissioner Irvin occurred in the morning of that day and new information came to

light regarding whether the notes had been prepared contemporaneously during Carol Irvin's 1999 conversation with Rose. Counsel first stated that "there was considerable confusion on the communication on those notes." Tr. at 1286. He then retracted his position that the notes had been made "contemporaneously" with the 1999 Rose phone call, concluding that he learned the notes had actually been written the week before at the same time as the statement was written. Irvin's counsel apologized for the misunderstanding he had with Carol Irvin regarding whether the notes were "original" notes of the conversation with Rose. *Id.* at 1289. A subsequent hearing was held to determine whether the initial representation of the timing of the preparation of the notes by counsel for Irvin, and the retraction of such representation after Plaintiff announced that a forensic examiner would evaluate the notes, constituted sufficient evidence pursuant to Federal Rule of Evidence 104 for the jury to find that Commissioner Irvin and his wife jointly proffered fabricated evidence to the Court. Carol Irvin testified, in an attempt to explain the misunderstanding, that she did take contemporaneous notes of the 1999 conversation with Rose, kept them in a file, recopied them on October 23, 2002, but then destroyed the original. She did not offer a plausible explanation for destroying the original notes, and Irvin's counsel withdrew his proffer for admission of the notes in evidence.

Thereafter, Plaintiff sought to present the circumstances of the attempt by counsel on behalf of the Irvins to gain permission from the Court for admission of the notes into evidence. Southern Union argued that this conduct was relevant to proving that Irvin intentionally interfered with

Southern Union's prospective business advantage and intentionally interfered with Southern Union's contractual relations. The Court delayed ruling on the request, but over the course of trial sufficient evidence was admitted to allow the admission of the notes and the attendant circumstances regarding them. The Court granted Southern Union's motion. Central to the Court's decision were two factors: Carol Irvin testified that Irvin knew about the notes before she disclosed them to his counsel, and that the day after Southern Union announced in open court that a forensic examiner would evaluate the notes, on November 1, Irvin attended the meeting when a decision was made to withdraw the notes. Irvin testified that his wife "made mention" of her notes from 1999 on the night of October 23, and that he directed her to call his counsel that night to discuss various issues concerning the trial. *Id.* at 6084; Tr. 12/6/02 at 4789-90. On the morning of October 24, Commissioner Irvin transported the notes in an envelope from Carol Irvin's possession to the office of his counsel. Carol Irvin testified that she told her husband that the notes were of her conversation with Rose, though Commissioner Irvin testified that he could not recall if his wife told him what was in the package. Tr. 12/13/02, at 6070-1, 6073.

The Court again finds that the evidence was sufficient for the jury to find intentional fabrication of evidence and that it was admissible to show Irvin's consciousness of wrongdoing and was relevant regarding the intent of Irvin when engaging in activities related to the claims. The jury instructions clarified that "[e]vidence that defendant Irvin offered fabricated evidence to the Court that he believed would be favorable to his defense, are circumstances that, if

proven, may be considered by the jury as showing consciousness of wrongdoing on the part of defendant Irvin." Instruction No. 20 [Doc. # 2196].

Both causes of action are intentional torts and both involve an element of "improper motive." The Complaint alleged significant deceit and concealment by Irvin. The attempted fabrication of evidence clearly shows the reprehensibility of Irvin's conduct. In short, he participated in a scheme to impede the jury's search for truth at trial. Because this conduct occurred three years after Irvin's wrongful conduct regarding the merger and because it constitutes a willful obstruction of justice, the jury could readily find that Irvin would continue to engage in improper conduct as a Commissioner. All of which strengthens the jury's concern that if Irvin was not deterred by an appropriate award of punitive damages, he would continue to engage in further reprehensible acts as an Arizona Corporation Commissioner.

Finally, Irvin's abuse of power included disregarding the interests of the rate-payers of Arizona, which is a centerpiece of his public duties as an Arizona Corporation Commissioner.[1] The jury's $60 million punitive damages

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1. Gregory Patterson, who represented Arizona consumers as Director of the Residential Utility Consumer Office (RUCO) during the time of the merger, testified at trial. Mr. Patterson confirmed that RUCO represents Arizona residential consumers as a party in proceedings before the Commission, and had a clear stake in any change in ownership of Southwest Gas and how it affects "the quality of service, the viability of the company, the intention to raise rates."

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award clearly evinces a condemnation of Irvin's conduct, a desire to punish him for the harm and potential harm suffered by both Southern Union and the citizens of Arizona, and to deter Arizona public officials from further abuses such as meddling with multi-million dollar corporate transactions in derogation of their duties of affording fairness to all parties participating in Commission matters.

(2) Ratio

In *Campbell*, the Supreme Court "decline[d] again to impose a bright-line ratio [between compensatory and punitive damages] which a punitive damages award cannot exceed." *Campbell*, 538 U.S. at __, 123 S.Ct. at 1524. Apart from this, the Court remarked, "[o]ur jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Campbell*, 538 U.S. at __, 123 S.Ct. at 1524. In this case, the compensatory award against Irvin was $390,072.58, meaning that the ratio of punitive to compensatory damages is about 153 to 1. Commissioner Irvin

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(Cont'd)

Tr. 5764, 5893. RUCO, representing consumers, may present its opinions and offer evidence, though it may not vote. Tr. 5890-94. Thus, the interests of Arizona consumers are clearly affected by the Commission's decisions and influence. Further, although Mr. Patterson advocated against the Southern Union merger before the Southwest Gas Board, he testified at trial that if he had known that he was basing his opinion on false information about Southern Union's debt-to-equity ratio, he would have given a different presentation to the Southwest Gas Board.

argues that the punitive damages award should be overturned solely because this ratio is excessive.

The Supreme Court's holding on ratios, however, is not categorical. The opinion acknowledges that a "few awards" exceeding a single-digitratio "to a significant degree" will meet the constitutional mark. The Court does not explore the circumstances under which larger awards will be upheld, though it provides some direction. In *Campbell*, the Court stated, "because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where a particularly egregious act has resulted in only a small amount of economic damages.' " *Id.* at 1524 (quoting *Gore*, 517 U.S. at 582, 116 S.Ct. 1589). In *Gore*, the Court, "reject[ing] the notion that the constitutional line is marked by a simple mathematical formula," surmised that "[a] higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine." *Id.* at 582, 116 S.Ct. 1589.[2] Considering the Supreme Court has only recently

2. The Supreme Court's recent pronouncements reflect a historical understanding that punitive damages serve to punish defendants where the harm is non-economic or difficult to quantify, such as in this case. In an early case upholding the recognition of the common law propriety of punitive damages, the Court noted, "[i]n many civil actions, such as libel, slander, seduction, & c., the wrong done to the plaintiff is incapable of being measured by a money standard; and the damages assessed depend on the circumstances, showing the degree of moral turpitude or atrocity of the defendant's conduct, and may properly be termed exemplary or vindictive rather than compensatory." *Day v. Woodworth*, 54 U.S. 363, 371, 13 How.

(Cont'd)

begun sketching these due process limits in a few cases, it is not surprising that the Court has not considered how to quantify the damage caused by a breach of the public trust by a public official.

But the case law does not preclude but supports a significant award resting on the particularly reprehensible actions by a public official in violation of the public trust. Because the injury caused by a public official's violation of the public trust is uniquely dependent on the variables of each public office, significant consideration in each case must be given to the nature of the public trust embodied in the position held by the official, e.g., the President of the United States in comparison to a precinct committee chairman. Consequently, application of the numerical ratio is most often unfit for the imprecise and limitless characterizations of the public trust. Further, punitive damages against public officials occupy a unique role in the jurisprudence of punitive damages, and have been assessed against public officials for oppressive conduct regardless of actual or compensatory damages. Concomitantly, the law allows punitive damage awards in § 1981 and § 1983 cases against public officials,

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(Cont'd)

363, 14 L.Ed. 181 (1851). The Court was compelled to deny Southern Union's demand for damages incurred as a consequence of the failed merger because they were legally incapable of measurement. This ruling is not to be interpreted as a finding that Southern Union did not sustain such damages. It meant only that the damages were "incapable of being measured by a money standard, and the [amount] assessed depend[ed] on the circumstances" that necessarily involved an elusive prediction of the degree of monetary success that would have followed a Southern Union-Southwest Gas merger.

even when a jury awards only nominal damages. Finally, the Supreme Court allows consideration of unquantifiable potential harm in assessing the ratio in these cases.

Initially, punitive damages against public officials for violations of the public trust are firmly grounded in the law, and the evidence suggest that punitive damages, as a historical matter, were developed *specifically* as a method to punish public corruption. According to the Restatement (Second) of Torts § 908, comment c, "[i]n the earliest cases in which punitive damages were allowed, the plaintiffs suffered no substantial harm, or at least no physical or financial harm appeared. These were the cases in which public officials were guilty of outrageously oppressive conduct." As some commentators have documented, early English "[c]ourts imposed these first exemplary damage awards against public officials who abused power in their official capacity, but the remedy soon took on a wider role." Michael L. Rustad & Thomas H. Koenig, *Taming the Tort Monster; The American Civil Justice System as a Battleground of Social Theory*, 68 Brook. L.Rev. 1, 57 (2002).[3] *See also Lane County v. Wood*, 298 Or. 191, 200, 691 P.2d 473, 477 (Or.1984) ("Historically, oppressive

3. Professors Rustad and Koenig explore the history of English and early American punitive damages in some detail, noting, for example, that "[j]ust as Roman Senators were assessed multiple damages when they oppressed the weak, the English courts punished high-handed aristocrats by imposing large fines paid directly to the victim." *Id.* at 55. Notably, the Court has often relied on this history in discerning Constitutional limits on punitive damages. *See Gore*, 517 U.S. at 580-581, 116 S.Ct. 1589 (analyzing early English statutes on exemplary damages).

conduct by public officers was the situation where early judges were most prone to sanction exemplary damages, and by which they justified and rationalized the doctrine.") (quoting McCormick, *Damages* 288, § 81 (1935)).

Because of this history, and the unique harm inflicted by a breach of the public trust, punitive damage awards assessed against public officials have in some cases required less of a proportional connection to actual monetary damages to be upheld. In *Lane County v. Wood*, 298 Or. 191, 691 P.2d 473 (Or.1984), the Supreme Court of Oregon thoroughly explored the history of punitive damages as related to public officials, and concluded that an award of *nominal* damages could support an award of punitive damages against a public official where the public official committed a breach of the public trust. Subsequent Oregon cases have clarified that this principle is limited to awards against public officials; in almost all cases, some amount of compensatory damages is necessary for an award of punitive damages. *See Klinicki v. Lundgren*, 298 Or. 662, 686, 695 P.2d 906, 922 (Or.1985) ("[A]bsent breach of public trust or cases in which damages are presumed, punitive damages cannot be awarded merely to punish . . . In other words, a proven discrete, discernable harm must underlie any punitive damages award.").

In *Lane County*, the plaintiff county sued a former county commissioner for fraud, breach of fiduciary duty, and breach of statutory duty for actions taken when the commissioner was still in office. In striking similarity to this case, a commissioner rigged a land deal to benefit two of his friends by manipulating his position as commissioner. The jury returned a verdict of $1.00 in nominal damages but $5000 in

punitives against the commissioner. The Oregon Court, after extensively reviewing the history, the Restatement, and leading authorities, concluded that the commissioner's actions, in breach of his fiduciary duty to the public, were "so egregiously culpable that an award of nominal damages is sufficient to support the award[ ] of punitive damages against [him]." 691 P.2d at 479.[4]

Lane County indicates that a violation of the public trust is itself a considerable, cognizable harm, though one without a definitive monetary value. Here, Irvin abused the public trust by misappropriating his elected authority to undermine fair consideration of Southern Union's offer. Southern Union suffered from Irvin's failure to afford it a fair and unbiased

4. An analogous case which the Oregon court appears not have considered is *Wilson v. Vaughn*, 23 F. 229 (C.C.D.Kan.1885). In that case, the Court held that exemplary damages could be awarded against public officials even where only nominal damages were found. The plaintiff sued county commissioners to recover damages for their wilful refusal to levy a tax on property pursuant to a valid judgment and writ of mandamus. The plaintiff suffered only delay of collecting the judgment, and thus only nominal damages. However, the Court upheld an award of exemplary damages, noting, "the plaintiff is deprived of a clear legal right through the wrongful and wilful conduct of the defendants. They alone have the power to levy the tax, and it is their duty, under the law and the command of the court, to levy it . . . [P]laintiff's compensatory damages are but nominal . . . but it is in the power of these defendants and their successors in office, by defying the law, to delay him indefinitely in its collection." *Id.* at 231-2. Thus, the Oregon court had at least one century-old pedigree to support its holding. *See also EEOC v. Wal-Mart Stores, Inc.*, 11 F.Supp.2d 1313, 1326 (D.N.M.1998) (relying on *Wilson* for the proposition that "exemplary damages may be awarded where only nominal damages are established").

investigation and consideration of its proposal for a merger. Apart from this injury, the public suffered by virtue of Irvin's bold defiance of the law that defined his duties and responsibilities. Accordingly, Irvin's argument that he, as a public official, should not be subject to different potential punitive damage standards as other defendants verges on being frivolous. The ratio of compensatory to punitive damages is not justified merely because Irvin is a public official, but because his conduct caused a harm to the public trust that is not discernable merely by an award of compensatory damages. *Cf. Davis v. McLaughlin*, 1989 WL 47699, *2 (E.D.N.Y. April 28, 1989) ("While it is true that a comparison of the two numbers might be a provident exercise in many cases, their ratio is of dubious value where, as here, intangible rights have been vindicated by plaintiff's successful claim.").

The decisions which allow the assessment of punitive damages in § 1983 suits filed against public officials, even when damages are only nominal (which almost always produces a ratio far in excess of 10:1), demonstrate a recognition in the law of the vital importance of preserving the public's trust in those who are chosen to govern, and to exercise their precious and sometimes almost limitless powers to effect changes and alter consequences effecting the lives of the very people who empowered the official. Following *Gore*, the Second Circuit has upheld an award of punitive damages in a case where only nominal damages were awarded against a public officer. In *Lee v. Edwards*, 101 F.3d 805 (2d Cir.1996), the Court upheld a punitive damages award of $200,000 in a case where plaintiff prevailed on a malicious prosecution claim. The Court noted, "the jury was

obviously unimpressed by Lee's claim to have suffered harm by reason of being prosecuted maliciously," however, "[a]s a police officer, Edwards exercised an authority backed by the weight and force of state power," which could allow the jury to find the officer's conduct "egregious and reprehensible." *Id.* at 810. The Court noted that *Gore* 's disapproval of a 500:1 compensatory to punitives ratio "does not necessarily control the fair ratios in a § 1983 case. We have said that punitive damages may be awarded in a § 1983 case, even if the compensatory damages are only nominal." *Id.* at 811 (citing *King v. Macri*, 993 F.2d 294, 297-98 (2d Cir.1993)). In short, "in a § 1983 case in which the compensatory damages are nominal, a much higher ratio can be contemplated while retaining normal respiration." *Id.*

Indeed, a number of courts have held that an award of nominal damages (or sufficient proof of injury) can support an award of punitive damages under § 1981 and § 1983, situations which *in particular* involve wrongdoing by a *public officer. See Gill v. Manuel*, 488 F.2d 799, 802 (9th Cir.1973) (in case where plaintiff sued police officers under § 1983, noting that "an award of punitive damages is not a necessary prerequisite to an award of punitive damages."); *Hennessy v. Penril Datacomm Networks, Inc.*, 69 F.3d 1344, 1352 (7th Cir.1995) (holding that award of compensatory damages is not necessary to support award of punitive damages under § 1981); *Timm v. Progressive Steel Treating, Inc.*, 137 F.3d 1008, 1010 (7th Cir.1998) (holding, post-*Gore*, no requirement of compensatory damages to support punitive damage award in Title VII sex discrimination suit) (citing *Erwin v. Manitowoc County*, 872 F.2d 1292, 1299 (7th Cir.1989) (holding no requirement of compensatory damages

to award punitive damages for constitutional damages under § 1983)); *King v. Macri*, 993 F.2d 294, 297-8 (2d Cir.1993) (punitive damage award need not be based on compensatory award in § 1983 actions) (citing *Press Pub. Co. v. Monroe*, 73 F. 196, 201 (2d Cir.1896) (holding, in action for violation of copyright, "exemplary damages are awarded in the federal courts, namely, as something additional to, and in no wise dependent upon, the actual pecuniary loss of the plaintiff, being frequently given in actions 'where the wrong done to the plaintiff is incapable of being measured by a money standard.' ") (quoting *Day*, 54 U.S. at 371, 54 U.S. 363)). *See also Deters v. Equifax Credit Information Serv.*, 202 F.3d 1262 (10th Cir.2000) (upholding 59:1 punitive to compensatory ratio in Title VII case with small compensatory damage award where injury was primarily non-economic).

Further, although the Supreme Court has not addressed this issue in its recent punitive damages decisions, it has emphasized the importance of punitive damages assessments against public officials. In the context of § 1983 suits against public officials for violations of constitutional rights, the Supreme Court has noted:

> By allowing juries and courts to assess punitive damages in appropriate circumstances against the offending official, based on his personal financial resources, the statute directly advances the public's interest in repeated constitutional deprivations. In our view, this provides sufficient protection against the prospect that a public official may commit recurrent constitutional violations by reason of his office. The Court

> previously has found, with respect to such violations, that a damages remedy recoverable against individuals is more effective as a deterrent than the threat of damages against a government employer.

City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 269, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981) (citing *Carlson v. Green*, 446 U.S. 14, 21, 100 S.Ct. 1468, 64 L.Ed.2d 15 (1980)). Public official punitive damage awards advance the public interest. by deterring a reappearance of official misconduct. If awards were restricted to adhere to a formula for calculating the punitive harm, the goal of deterrence, in some case, will be lost.

The Court realizes, of course, that the this case was not brought as a civil rights action. However, the same reasoning supports a punitive award to punish and deter the abuse of power by public officials in these cases. First, the conduct here bears the hallmarks of a civil rights action, including an official acting under color of state law, intentional misconduct, and biased and differential treatment of parties before the Commission in ways that undermine due process and equal protection of the laws. Although Southern Union, as a corporation, may not be able to bring a § 1983 suit, such due process violations affect the public as a whole. Corporation commissioners possess wide powers to "inspect and investigate the property, books, papers, business, methods, and affairs of any corporation whose stock shall be offered for sale to the public and of any public service corporation doing business within the state, and for the purpose of the commission, and of the several members

thereof, shall have the *power of a court of general jurisdiction* to enforce the attendance of witness and production of evidence by subpoena, attachment, and punishment, which said power shall extend throughout the state." Jury Instruction No. 15 [Doc. # 2196] (emphasis added). As the Arizona Supreme Court has noted,

> When an Arizona administrative agency unreasonably infringes on the liberties of a corporation, its officers, and its shareholders, it is the Arizona courts who must be able to curb the abuse of power. The Corporation Commission has been treated as a fourth branch of government in Arizona . . . [I]f an administrative agency's investigation becomes a tool of harassment and intimidation rather than a means to gather appropriate information, the appropriate court may intrude and stop the incursion into the constitutional liberties of the parties under investigation . . . The Commission is empowered to investigate for purposes of enforcing the securities laws; the Commission has no authority to determine on a basis other than compliance with the securities laws those persons or corporations who may conduct business in Arizona. The Commission may not constitutionally use its investigatory powers to harass, intimidate, and defame a business into leaving the state.

Polaris International Metals Corp. v. Arizona Corporation Commission, 133 Ariz. 500, 506-7, 652 P.2d 1023, 1029-30 (1982). The record is replete with evidence of bias and a

failure to provide due process and impartial consideration of Southern Union's offer.

Second, the civil rights cases reflect a broader goal of deterring abuses of the public trust by public officials that is not limited to individual constitutional rights violations. As the Second Circuit noted in *Zarcone v. Perry*, 572 F.2d 52, 56-7 (2d Cir.1978), in a decision upholding punitive damages against public officials for constitutional violations, "it is clear that substantial exemplary damage verdicts are appropriate in intentional tort actions not involving constitutional deprivations." *See also Lane County*, 691 P.2d at 479 ("It may be that the property involved appreciated in value so that no actual loss was sustained by the county, but that fortuitous result does not diminish the severity of the wrongful acts . . . The misconduct by [the defendants] was intentional, not just careless. The scheme was premeditated, not reckless. The two defendant, motivated by greed, were found by the jury to have acted together knowingly to violate an official trust place on Wood by the public.").

Moreover, the Supreme Court has not limited the ratio calculation to actual compensatory damages, and has suggested that comparisons to *potential* harm are appropriate. In *TXO*, the Court upheld a punitive damages award where the ratio of punitive to compensatory damages was about 526:1, relying in part on the potential for damages caused by the defendant's conduct. The plurality noted that "this Court [has] eschewed an approach that concentrates entirely on the relationship between punitive and actual damages. It is appropriate to consider the magnitude of the *potential harm* that the defendant would have caused to its intended victim

if the wrongful plan had succeeded . . ." *TXO*, 509 U.S. at 459, 113 S.Ct. 2711 (plurality opinion) (italics in original). The use of potential harm in assessing the ratio continues throughout the Court's most recent decisions, but neither *Gore* nor *Campbell* involved an issue of potential harm because the issue was not relevant in those cases. *See Gore*, 517 U.S. at 575, 116 S.Ct. 1589 (describing second guidepost as "the disparity between the harm or potential harm . . . and [the] punitive damages award"); *id.* at 581, 116 S.Ct. 1589 (relying on the plurality's "potential harm" holding in *TXO* to discern lower ratio in that case); *Campbell*, 538 U.S. at __, 123 S.Ct. at 1520 (describing second guidepost in terms of "actual or potential harm").[5]

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5. Notably, in this case, the ratio is dramatic primarily because the Court previously found Southern Union's lost profit calculations to be too speculative to support recovery for lost profits, and limited Southern Union to recovery of only out-of-pocket reliance damages. *See Southern Union Co. v. Southwest Gas Corp.*, 180 F.Supp.2d 1021, 1051 (D.Ariz.2002) ("The indeterminacy concerning this basic merger term illustrates that Southern Union's claim for lost profit damages is too speculative to support recovery."). To the extent that due process limits the size of a punitive damage award because the defendant is not on notice of his potential liability, Irvin's undisputed experience and knowledge made him aware of the potential enormous risks of his conduct would have in disrupting a multi-million dollar transaction. *See Campbell*, 538 U.S. at __, 123 S.Ct. at 1525 (quoting *Gore*, 517 U.S. at 585, 116 S.Ct. 1589 (Breyer, J., concurring)) (discussing fair notice requirements); *Gore*, 517 U.S. at 574, 116 S.Ct. 1589 ("Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice . . . of the severity of a penalty that a State may impose."). See also the discussion of Southern Union's damages *supra* at 9, n. 2.

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Again, though the Court held that Southern Union was not entitled to recover damages for speculative lost profits, the potential for such damage could be factored into the jury's decision to punish Irvin. For example, another district court in the Ninth Circuit recently upheld a punitive damages award of $5,000,000 in a § 1981 racial discrimination case against a private corporation even though the jury found only nominal damages. *See Bains LLC v. Arco Products Co.*, 220 F.Supp.2d 1193, 1201 (W.D.Wash.2002). As the Court noted, "[t]he jury's award of nominal damages and high punitive damages is reflective of its findings that while compensatory damages were difficult to calculate, the egregiousness of Defendant's conduct was obvious to everyone in the courtroom." *Id.* at 1201. *See also Swinton v. Potomac Corp.*, 270 F.3d 794, 819 (9th Cir.2001) (in upholding a 28:1 punitive to compensatory damage ratio in private racial harassment claim, noting "[t]he fact that the harm from unchecked racial harassment occurring day after day cannot be calculated with any precision does not deflate its magnitude").

In short, in consideration of the unquantifiable breach of the public trust by Irvin and the significant potential damages faced by Southern Union, reliance upon the ratio of punitive to compensatory damages is unwarranted. In a case of such egregiousness, the benchmark of a simple numerical ratio, where the Supreme Court has repeatedly clarified that it has not established a bright-line categorical rule, does not defeat the award because it violates due process. *Cf. Swinton*, 270 F.3d at 819 ("We find little comfort in trying to discern [ratio] parameters from other cases because the circumstances vary so widely. Such an exercise simply results in a scatter graph that pushes the decision

toward a mathematical bright-line, a path that we eschew in accord with the Supreme Court guidelines."). Under the second *Campbell* guidepost, the award is not constitutionally excessive.

(3) Penalties imposed in comparable cases

The third guidepost is a comparison of the punitive damages award with civil or criminal penalties for comparable misconduct. *Campbell*, 538 U.S. at __, 123 S.Ct. at 1526. The exact method of application of this criterion in unclear in *Gore* or *Campbell.* In *Campbell*, the Court rejected comparable civil and criminal penalties as a justification for the size of the award, noting that "[t]he existence of a criminal penalty does have bearing on the seriousness with which the State views a wrongful action. When used to determine the dollar amount of the award, however, the criminal penalty has less utility." *Id.* at 1526. Further, the Court noted that the most relevant civil sanction involved a maximum fine of $10,000. *Id.* In *Gore*, 517 U.S. at 583-5, 116 S.Ct. 1589, the Court also noted that the defendant's actions were subject to a much smaller civil fine than the award of punitive damages.

Irvin argues that this punitive damages award should be struck down because it far exceeds any comparable or civil penalty, and also exceeds any punitive damages award upheld in Arizona. Irvin relies on *Ace v. Aetna Life Ins. Co.*, 139 F.3d 1241, 1248-9 (9th Cir.1998), in which the Ninth Circuit, without extensive comment, invalidated a $16.5 million punitive damages award with a 130-to-1 punitive-to-compensatory damages ration where "the ratio . . . is far beyond any approved by Alaska courts . . . [and] the amount

of punitive damages far exceeds the potential civil and criminal penalties." Southern Union argues that the award does not exceed awards upheld in a few other (out-of-state) cases, and thus Irvin was on notice of the prospect of sufficiently large penalties. *See, e.g., TXO*, 509 U.S. at 459, 113 S.Ct. 2711 (1993) (upholding 526 to 1 punitive to compensatory damage ratio); *In re Exxon Valdez*, 236 F.Supp.2d 1043 (D.Alaska 2002) (upholding $4 billion of punitive damages award in case involving economic (not environmental) damage of oil spill). As for state civil penalties, Southern Union essentially concedes that none would mandate any comparable monetary award unless Irvin was ordered to pay restitution for lost profits. However, under Arizona law, even if Irvin were required to pay restitution as part of a criminal conviction, the sum would not include compensatory damages such as lost profits. A.R.S. § 13-105(14); 13-804(A). On the other hand, Irvin's conduct almost certainly could be framed as mail and wire fraud under federal law, and, if proven, he would be subject to a fine "not more than the greater of . . . twice the gross [pecuniary] loss" to Southern Union. 18 U.S.C. § 3571(d).

Unfortunately, the cases cited by the parties do not involve circumstances analogous to Irvin's misconduct in this case. Such comparisons provide no meaningful guidance for the Court to determine whether the award is unconstitutionally excessive. As the Supreme Court has noted, "the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Campbell*, 538 U.S. at __, 123 S.Ct. at 1521 (quoting *Gore*, 517 U.S. at 575, 116 S.Ct. 1589). Here, the degree of reprehensibility is established by the

breach of the public trust, and the parties provide no case law concerning punitive damage awards against Arizona public officials. As previously discussed, awards against public officials for breach of the public trust occupy a unique status in the imposition of punitive damages. *See Lane County*, 691 P.2d at 479. Again, it is difficult "to discern parameters from other cases because the circumstances vary so widely." *Swinton*, 270 F.3d at 819. Finding some concrete numerical limit to this award grounded in the Constitution is "not an enviable task" and not amenable to ready application of a formula. *Leatherman Tool Group, Inc. v. Cooper Industries, Inc.*, 285 F.3d 1146, 1152 (9th Cir.2002) (quoting *Inter Medical Supplies v. EBI Medical Systems*, 181 F.3d 446, 468 (3rd Cir.1999)). Under the *Campbell* and *Gore* guideposts, in consideration of Irvin's egregious conduct flaunting the public trust, the award is not constitutionally excessive, and the Court need not hypothesize some outer limit to the punitive damages allowable in this case.

C. Additional findings

The Court notes that Commissioner Irvin should be personally liable for payment of the punitive damages award. For example, under the Bankruptcy Code, 11 U.S.C. § 523(a)(6), a debt is not dischargeable in bankruptcy proceedings when it is incurred "for willful and malicious injury by the debtor to another entity or to the property of another entity." Commissioner Irvin, as clearly shown by the jury's verdict, engaged in fraudulent activity constituting tortious conduct resulting in a willful and malicious injury to Southern Union. *See In re Jercich*, 238 F.3d 1202, 1205-6 (9th Cir.2001) (tortious conduct causing willful and malicious

injury is not dischargeable under § 523(a)(6)); *In re Riso*, 978 F.2d 1151, 1154 (9th Cir.1992) (same). Further, a public employee is only immune from liability for punitive damage awards if acting within the scope of his employment. A.R.S. § 12-820.04. Though that issue was never presented to the jury for resolution, the record in this case strongly suggests that he was not.

In conclusion, the reasoned judgment of the jury that Commissioner Irvin should be punished in an amount of $60 million will stand.

Accordingly,

IT IS ORDERED that Defendant Irvin's Amended Motion for JNOV or in the Alternative for New Trial or Remittitur [Doc. # 2238] is **DENIED.**

DATED this 31 day of July, 2003.

Roslyn O. Silver

United States District Judge

APPENDIX D — FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA ENTERED AUGUST 18, 2003

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

SOUTHERN UNION COMPANY,
a Delaware corporation,

Plaintiff,

vs.

SOUTHWEST GAS CORPORATION,
a California corporation, et al.,

Defendants.

No. CIV-99-1294-PHX-ROS

Pertaining to all Cases:
CIV-99-1294-PHX-ROS
CIV-00-0119-PHX-ROS
CIV-00-0452-PHX-ROS
CIV-00-1775-PHX-ROS

August 14, 2003, Dated
August 18, 2003, Entered

FINAL JUDGMENT

These consolidated actions came on for jury trial on October 29, 2002, the Honorable Roslyn O. Silver presiding. On December 18, 2002, all remaining matters having been duly tried and submitted to the jury, the jury rendered its verdict in matter CIV-99-1294-PHX-ROS. Judgment is hereby entered in favor of Southern Union Company and against Defendant James M. Irvin as follows: (1) On Southern

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Union's claim for intentional interference with contract, the sum of $975,181.46, adjusted by relative degrees of fault to $390,072.58; (2) On Southern Union's claim for intentional interference with business expectancy, the sum of $975,181.46, adjusted by relative degrees of fault to $195,036.29; (3) The higher amount of $390,072.58 constitutes the total actual damages assessed against Defendant Irvin, and in favor of Southern Union; (4) Punitive damages in the sum of $60,000,000.00; (5) Its cost of suit as taxed by the Clerk and as approved by the Court.

DATED this 14 day of August, 2003.

s/ Roslyn O. Silver
Roslyn O. Silver
United States District Judge

APPENDIX E — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA DENYING MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND FOR A NEW TRIAL ENTERED AUGUST 28, 2003

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

281 F. Supp. 2d 1117

SOUTHERN UNION COMPANY,
a Delaware corporation,

Plaintiff,

v.

SOUTHWEST GAS CORPORATION,
a California corporation, et al.,

Defendants.

CV-99-1294-PHX-ROS

August 24, 2003, Decided
August 28, 2003, Entered

OPINION

SILVER, *District Judge*.

On December 18, 2002, the jury returned a verdict for Plaintiff Southern Union Company ("Southern Union" or "SUG") against Defendant James Irvin ("Irvin" or "Commissioner Irvin"). This Order summarizes and explains a number of evidentiary rulings made during trial and the

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Court's decision to deny Irvin's Motion for Judgment Notwithstanding the Verdict. In particular, on December 10, 2002, the Court held a hearing and issued final rulings on the admissibility of certain evidence raised during the cross-examination of Commissioner Irvin. The Court allowed Plaintiff Southern Union to question Irvin on notes written by his wife, Carol Irvin, in October 2002, and on the Clean Elections Act Qualifying Contribution Form ("Qualifying Contribution Form" or "Contribution Form" or "Form") signed by Irvin in May 2002 under penalty of perjury. The Court promised a written opinion would follow. This is that opinion.

I. Background

On December 18, 2002, after a jury trial of nearly two months, the jury returned a verdict for Plaintiff Southern Union Company ("Southern Union") against James Irvin, the only remaining Defendant at the conclusion of trial.[1] Plaintiff prevailed on both causes of action, intentional interference with business expectancy and intentional interference with contractual relations, caused by Irvin's improper and wrongful activities in early 1999 to bring about the merger between Southwest Gas Corporation (SWG) and ONEOK, Inc. instead of SWG and Plaintiff. The evidence of wrongful conduct established that Irvin, a Corporation Commissioner at the time of the activities relating to the merger, was

1. Jack Rose was a Defendant at the beginning of and throughout the trial, until closing arguments at which time he reached a settlement with Plaintiff on December 13, 2002. Rose invoked his Fifth Amendment privilege against self-incrimination before and during trial and therefore did not testify about his activities in early 1999 or the alleged phone conversation with Carol Irvin in 1999.

instrumental in ensuring that ONEOK rather than the Plaintiff was the chosen merger partner by the SWG Board of Directors.

During cross-examination of Defendant Irvin, Plaintiff was allowed to pursue questioning on two issues.[2] First was the notes of a purported conversation Carol Irvin, the wife of Commissioner Irvin, had with Jack Rose in July 1999 and her statement of an alleged event she witnessed in 1999, that was memorialized in the statement. The two separate documents ("the Carol Irvin notes") were initially brought to the Court's and to counsels' attention by Irvin's counsel on October 24, 2002 and proffered as new and material evidence. After Southern Union informed counsel and the Court that a forensic examiner would be proffered to testify to his opinion regarding when the notes were prepared, the following afternoon counsel for Irvin withdrew the notes as possible evidence. The second issue was evidence that Irvin had been untruthful in signing a Qualifying Contribution Form from a supposed contributor, Ken Dickson, who swore that he never contributed money to Irvin despite the express

2. At a hearing held Sunday, December 8, 2002, after the Carol Irvin notes and Clean Elections form issues concerning Irvin's testimony had been raised during trial but before Irvin resumed the stand, the Court gave clear notice to Irvin's counsel of decisions on the admissibility of this evidence. Tr. 4918-22. The Court gave warning to the parties, "I am telling you this today because I want you to certainly confer with [Commissioner Irvin] before he [retakes] the stand . . . and after you've had a chance to brief the issues which I've presented to you." Tr. at 4920. Then the Court informed counsel that inquiry into the two areas of contention would be allowed if Irvin resumed his testimony.

statement on the form to the contrary. Plaintiff sought to introduce Irvin's false statements on the Contribution Form as impeachment evidence.

II. The Carol Irvin Notes

On October 24, 2002, the week before trial began, Irvin's counsel informed the Court in the late evening that new evidence had been discovered and would be offered at trial. This evidence included two pages of notes written by Carol Irvin dated "7-31-99." The notes described a telephone conversation between Carol Irvin and Defendant Jack Rose, an assistant to Irvin at the time of the failed merger, occurring on July 31, 1999, and the notes were represented as made "contemporaneously" with the 1999 conversation. The notes unambiguously expressed that Rose allegedly informed Ms. Irvin of his sentiment and opinion, that he was principally involved in working on the merger while "Jim [Irvin was] not involved." The notes continued, in part, to exculpate Irvin with Rose's alleged remarks that "Jim [Irvin] did nothing wrong-Jack working with others to bring Oneok to AZ. Jim not involved-trusted Jack to do research . . . Jack did a lot without Jim knowing cuz Jim busy at Commiss. Jack working in AZ Best interest. When will Jim be home-Jack needs to tell Jim s-o-o much he doesn't know! . . . Call me anytime! I'm there for you! Don't worry-we did nothing wrong."

Further, the notes were written on the back of unrelated documents dated March 30, 1998 and April 8, 1998, which gave credence to the statement of Irvin's counsel that the notes were made in 1999, contemporaneously with the phone call. Concomitantly, the written statement of an event

occurring in 1999, which was represented as drafted by Carol Irvin two weeks prior to the October 24 hearing, was written on blank paper. This feature further supported the proposition that the notes, in contrast, were made contemporaneously during the Rose conversation. Also, the notes are not complete sentences but are unconnected words or phrases appearing as if Carol Irvin was listening to Rose speak and hurriedly taking down the meaning of the statements. In comparison, however, the memorandum of the event in 1999 was written with complete sentences and appropriate paragraphs as if written in thoughtful recollection of that event.

After Irvin's counsel presented the notes to the Court and opposing counsel, the Court ordered Irvin's counsel to produce the documents for inspection by Plaintiff's and Rose's counsel. On October 31, 2002, Plaintiff's counsel requested an opportunity to conduct a forensic examination of the notes, and the Court granted the request. In the morning of November 1, 2002, counsel for Irvin phoned the Court and requested an emergency hearing that day, which was held the same afternoon. At the telephonic hearing, Irvin's counsel began with the assertion that "there was considerable confusion on the communication on those notes." Transcript ("Tr.") at 1286. He then retracted his earlier statement that the notes of the 1999 conversation between Rose and Carol Irvin had been made "contemporaneously" at the time of the phone call. He elaborated, stating that the notes had actually been prepared by Carol Irvin sometime the week before October 24, at the same time she prepared the statement memorializing the event she witnessed in 1999, and apologized for his misunderstanding of Carol Irvin's

description of the notes. *Id.* at 1289. Essentially, he explained that when she used the word "original" in describing the notes she did not mean that they were contemporaneously written during the conversation with Rose.

The testimony of Carol Irvin was given at a hearing convened to determine if Commissioner Irvin and Carol Irvin fabricated evidence with the intent that his lawyers use it in his defense, and concomitantly whether it would be admitted at trial. The Court learned for the first time that Carol Irvin claimed that she did take notes contemporaneously during the conversation with Rose in 1999, but that on October 23, 2002 she recopied them on another piece of paper, and then destroyed the original. She gave no credible explanation for, on the eve of trial, recopying the original notes three years after they were written, and then destroying the originals. She gave no credible reason for the Court to dismiss the obvious indicia supporting the first proposition of Irvin's lawyers, that she clearly told Irvin's counsel that the notes were the original notes made at the time she spoke to Rose. Left unanswered was why the recent copying of the original notes was mysteriously written on paper with the date 1998 on the back? Concomitantly, why the statement memorializing the 1999 event prepared at the same time the notes were prepared was written on a blank piece of paper? Further, she offered no believable reason for copying the notes using unconnected phrases which resembled the writing of a person attempting to memorialize the content of a conversation *while it was occurring*. Finally, conspicuously absent was an explanation for the highly suspicious retraction of Irvin's counsel's initial emphatic description of the notes as contemporaneously made, swiftly following SUG's

announcement that a forensic expert was prepared to testify precisely when they were written. Carol Irvin's testimony in support of her allegation that she recopied and then destroyed the original notes was composed of tenuous assertions strung together by strands of surmise and illogic. Apparently counsel for Commissioner Irvin also had doubts regarding the plausibility of how and why the notes were created and destroyed, because despite Carol Irvin's under oath explanation, Irvin's counsel opted to withdraw the notes from evidence.

Thereafter, Plaintiff sought admission of evidence establishing that Defendant Irvin and his wife fabricated evidence material to his defense and then offered it through counsel for admission at trial. Over the course of the trial the Court found the evidence sufficient pursuant to Federal Rule of Evidence 104 for the jury to find that Defendant Irvin had engaged in fabricating evidence favorable to his defense and then offering it as evidence in the trial. Further, the Court held that if the jury found that Commissioner Irvin attempted, through his counsel, to have admitted into evidence fabricated and arguably exculpatory evidence, the attempt was relevant to whether Irvin had the state of mind required for both causes of action. Both are intentional torts, alleging in particular a variety of deceitful and fraudulent acts committed by Irvin to accomplish the goal of a ONEOK-SWG merger. Also, the jury could have found that the same acts demonstrated his consciousness of the wrongdoing alleged in both causes of action. Hence, cross-examination of the extent of Irvin's involvement in the acts was relevant to determine his credibility.

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Central to the Court's decision that this evidence was admissible against Irvin are four factors: Carol Irvin testified that Irvin knew about the notes before she disclosed them to his counsel, and the evidence established that he was present at the November 1 meeting when the decision was made to withdraw the notes from evidence. Also, during cross-examination, Irvin testified that his wife "made mention" of her notes from the 1999 Rose conversation on the night of October 23, and that he directed her to call his counsel the same night to discuss them along with the issues concerning the trial. *Id.* at 6084; Tr. 12/6/02 at 4789-90. Then, on the morning of October 24, Commissioner Irvin took the notes in an envelope from Carol Irvin and delivered them to his counsel. Of critical significance was the inconsistency of the testimony between Carol Irvin, who testified that she told her husband the notes were of her conversation with Rose, and Irvin's testimony minimizing her statement by telling the jury that he could not recall if his wife had told him what was in the package. Tr. 12/13/02, at 6070-1, 6073.

Because the Court held that the jury could have found that Irvin was involved in these acts, the evidence was admitted with a clarifying instruction. The instruction given was "[e]vidence that defendant Irvin offered fabricated evidence to the Court that he believed would be favorable to his defense, are circumstances that, if proven, may be considered by the jury as showing consciousness of wrongdoing on the part of defendant Irvin." Instruction No. 20 [Doc. # 2196]. Both causes of action are intentional torts, requiring proof of "improper motive," allegedly signified by Irvin's deceit and concealment. Fabrication of evidence followed by offering it at trial because it was material to his

defense is specifically relevant to whether he intentionally engaged in improper conduct, and whether he testified truthfully. *See United States v. Perkins*, 937 F.2d 1397, 1401-2 (9th Cir.1991) (false exculpatory statements may be considered by jury as evidence of consciousness of guilt); *United States v. Collins*, 90 F.3d 1420, 1428 (9th Cir.1996) (inducing witness to testify untruthfully or participating in the proffer of untruthful evidence shows consciousness of guilt) (citing *United States v. Brashier*, 548 F.2d 1315, 1325 (9th Cir.1976) (holding same)); *Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir.1993) (court has "broad discretionary power" to allow jury to draw adverse inference from destroyed or spoliated evidence); *United States v. Scheibel*, 870 F.2d 818, 822 (2nd Cir.1989) (jury may consider fabrication of exculpatory evidence as proof of consciousness of guilt); *Great Coastal Express, Inc. v. International Brotherhood of Teamsters*, 675 F.2d 1349, 1357 (4th Cir.1982) (noting that "[p]erjury and fabricated evidence are evils that can and should be exposed at trial. . . .").

III. The Clean Elections Act Contribution Form

At trial, Southern Union questioned Irvin about alleged misrepresentations he made on a Qualifying Contribution Form. The Contribution Form is provided by the State of Arizona Clean Elections Commission and is used to document five-dollar contributions toward a candidate's campaign. The candidate needs to gather a certain number of these contributions to qualify for state campaign funding. The Contribution Form presented by SUG at trial indicated that Ken Dickson had given five dollars to Irvin's campaign on May 23, 2002. At the bottom, the Contribution Form

requires a certification by the candidate [Irvin] that: "[he], the undersigned, upon [his] oath and under penalty of perjury, [certified] that [he] received a $5.00 contribution from the above contributor, who is to the best of [his] information and knowledge, a qualified elector of this state." Commissioner Irvin signed the Form, however, Ken Dickson stated in an affidavit that he never contributed five dollars to Irvin's campaign.

During Commissioner Irvin's testimony, Southern Union sought to impeach his credibility by questioning him about the Contribution Form. Under examination, Irvin testified that the signature on the Form was his, Tr. 12/6/02 at 4806, that Dickson did not fill out the Form in his presence, *id.* at 4807, and that on May 23, 2002, Irvin "wasn't with him [Dickson]." *Id.* at 4808. Because the Form required a signature by the candidate, under penalty of perjury, the Court allowed questioning of Irvin about the Contribution Form and particularly whether he understood that by signing the Form without personal knowledge of whether the $5.00 contribution was made by the person named on the Form, he violated the Clean Elections law. *Id.* at 4809-10. During cross-examination, however, Irvin's counsel informed the Court at sidebar that Irvin was told by the a Clean Elections official that he could sign the form even if he did not personally receive the money. The Court suspended the cross-examination on the issue until it was clarified what he was told by the official. The matter was not raised again during Irvin's testimony because counsel reached an agreement that it would not be pursued any further.

Appendix E

The evidence that Irvin signed the form under penalty of perjury without appropriate knowledge of the contributor's identity was admissible under Fed.R.Evid. 608(b) to challenge the truthfulness of Commissioner Irvin's testimony. The Ninth Circuit has held that "[e]vidence of prior frauds is considered probative of the witness's character for truthfulness or untruthfulness." *United States v. Gay*, 967 F.2d 322, 328 (9th Cir.1992). *See also United States v. Girdner*, 773 F.2d 257, 261 (10th Cir.1985) ("Appellant placed his credibility at issue when he took the stand. The court did not abuse its discretion in allowing cross-examination of appellant's previous falsehoods and deceitful actions in the ballot fraud scheme as being probative of appellant's truthfulness."). Further, under Rule 403, any unfair prejudice did not outweigh the probative value of the evidence. The credibility of Commissioner Irvin's testimony was an important component of how the jury reached a verdict. While the jury might disbelieve Irvin on this issue, the danger of unfair prejudice was minimal, because the jury was unlikely to find him liable solely because he was found untruthful on this issue in light of the considerable evidence of his false statements on the more serious allegations of his conduct. Further, it is inescapable that his acts in connection with his candidacy were relevant to SUG's argument of his motive to engage in wrongdoing. Plaintiff claimed that Irvin, at the behest of SWG management, participated in the fraudulent and wrongful harm to SUG because he hoped it would promote his political career.

Irvin also contended that the questioning was improper because there was evidence that the Contribution Form could be legally signed by Commissioner Irvin without any

verification on his behalf that the five dollars actually was contributed by Ken Dickson. Irvin's argument is not persuasive, for at least three reasons. First, Irvin's legal interpretation of his obligation when signing the form conflicts with its plain language, in the first component of the form, requiring that the signer certify "under penalty of perjury" that the five dollars is from the named contributor. In contrast, the second part of the certification merely requires that the signer attest to "the best of [his] information and knowledge" of the electoral qualifications of the candidate. Irvin's interpretation of the first part of the Contribution Form was that it also only required that to the "best of information and knowledge" he knew the identity of the contributor. But the Form expressly requires that the identity of the contributor must be certified "under penalty of perjury."

Second, Irvin raised his objections to this line of questioning too late during the trial. Plaintiff indicated that it would provide impeachment evidence concerning the Clean Elections Contribution Forms as early as November 15, and based on the Court's order, timely provided the forms to Irvin's counsel. Only after Irvin was asked about the Contribution Form on December 6, 2002 during cross-examination, did Irvin's counsel spring into action and request a sidebar to argue for the first time that the law validated Irvin's signing of the form without knowing the identity of the contributor of the $5.00. A lengthy discussion took place concerning whether the plain and unambiguous words on the form could have been disregarded by Irvin. The Court ordered a recess, and precluded further inquiry of Irvin on the subject, until opposing counsel and the Court were apprised by a qualified election official of the correct

interpretation of the language on the Form. In order to ensure the Court ruled in his favor on this issue, Irvin should have brought his argument to the Court's attention long before cross-examination began.

Finally, Irvin's *post hoc* legal explanation is irrelevant to Irvin's state of mind at the time he signed the form. His counsel's interpretation of the Clean Elections Act was only relevant if Irvin had a subjective belief *at the time of signing the Form*, expressly under penalty of perjury, that he could legally do so. Irvin, however, offered no such evidence. He never testified that this was his belief in May 2002, and in fact, never elaborated on the matter after his counsel's objections. It remains a mystery why all counsel agreed not to further pursue the topic on direct or cross-examination. Irvin had the opportunity to explain the possible discrepancy in signing the Contribution Form, but chose not to offer any explanation.

IV. Questioning of Irvin relating to the truth of witness testimony

As a final evidentiary matter, Commissioner Irvin was asked at trial about the contents of a conversation he had on April 5, 1999 with Michael Maffie and Thomas Hartley. Irvin's testimony arguably contradicted Maffie's and Hartley's recollection of the 1999 conversation. After both Maffie's and Hartley's testimony was in evidence and Irvin controverted their testimony, SUG counsel inquired of Irvin, "Did Mr. Maffie and Mr. Hartley lie when they said [to the Board] that you said Southern Union wouldn't pass regulatory

approval?" (Tr. 12/5/02 at 4549).[3] Counsel for Irvin objected to Southern Union asking Irvin's opinion of whether another witness had lied, and the Court overruled the objection.

In support of his objection, counsel later cited *United States v. Sanchez*, 176 F.3d 1214 (9th Cir.1999) for the proposition that a witness should never be asked to comment upon the truthfulness of another witness's testimony while on the stand. In *Sanchez*, a criminal defendant gave testimony on the witness stand that arguably conflicted with the testimony of a police officer called as a prosecution witness. The prosecutor then asked the defendant whether he was "telling the . . . Jury that [the officer] lied to them?" *Id.* at 1219. The Court held that "the prosecutor's questions compel[ing] Sanchez to give his opinion regarding the credibility of a deputy marshal . . . was error." *Id.* at 1220.

Sanchez, however, did not hold that asking a witness to provide such an opinion is categorically improper. On the contrary, *Sanchez* and the cases upon which it relies are all criminal cases, where the credibility of the criminal defendant was absolutely essential to his defense but was challenged by questions regarding the truthfulness of another witness's testimony. *See, e.g., United States v. Sanchez-Lima*, 161 F.3d 545, 548-49 (9th Cir.1998) (bolstering of prosecution witness's testimony improper where "jury's verdict necessarily depended on the credibility of the bolstered witness"); *United States v. Geston*, 299 F.3d 1130, 1136 (9th Cir.2002) (questioning improper where prosecution required

3. Irvin responded, "I'm not saying that they lied at all, Mr. Herschmann," and later added, "I don't recall what transpired in that conversation."

witnesses to "offer opinions regarding the veracity of the government's witnesses"). In those cases, the determinations of truthfulness and credibility also directly pertained to the ultimate issue, guilt or innocence, to be decided by the jury, and a defendant's opinion whether law enforcement agents were more truthful than the defendant is often substantially prejudicial. As many courts have recognized, the propriety of such a question may depend on the context in which the question is asked. *See State v. Morales*, 198 Ariz. 372, 376, 10 P.3d 630, 633 (Ariz.App.2000) (also a criminal case, declining to adopt a bright line rule prohibiting or allowing such a question and noting, "[d]espite those concerns, 'were they lying' questions may not always be improper"); 29 Wright & Gold, *Federal Practice and Procedure* § 6255 n. 19 ("On the other hand, the balance shifts in the direction admitting lay opinion as the distance increases between the opinion and the ultimate issues."). As the Arizona Court of Appeals stated in *Morales*, "such questions may be appropriate when the only possible explanation for the inconsistent testimony was deceit or lying." *Morales*, 10 P.3d at 633.

In this case, the questioning of Commissioner Irvin served merely to illustrate the inconsistency of his testimony with that of Maffie and Hartley whose testimony on material issues was also inconsistent. Perhaps a less pejorative characterization of the opinion as a "lie," such as, "less than truthful," would have been preferable. The jury, however, remained free to determine whose testimony it would credit. Moreover, unlike in a criminal trial, the ultimate issue of wrongfulness, did not turn on the opinion of Irvin regarding whether he believed Maffie and Hartley were truthful.

Moreover, unlike the defendant in *Sanchez*, Irvin was not prejudiced by being asked to impugn the credibility of government witnesses, who, despite an instruction otherwise, are often accorded more credibility because they are law enforcement officers. Rather, Irvin was asked to comment on the credibility of witnesses who, as Southern Union alleged, were actually co-venturers in the joint venture to block SUG's proposed merger.

V. Irvin's Motion for JNOV or New Trial

At a hearing on June 2, 2003, the Court denied Commissioner Irvin's Motion for a Judgment Notwithstanding the Verdict under Fed.R.Civ.P. 50(b), and a new trial under Fed.R.Civ.P. 59[4] [Doc. # 2238]. Under Rule 50, the Court may grant Irvin judgment as a matter of law, if the "evidence construed in the light most favorable to the nonmoving party permits only one reasonable conclusion, and that conclusion is contrary to the jury's." *Vollrath Co. v. Sammi Corp.*, 9 F.3d 1455, 1460 (9th Cir.1993). Another way to formulate this standard is that the verdict of the jury must be upheld unless there is no "substantial evidence" to support the jury's verdict. *Landes Construction Co. v. Royal Bank of Canada*, 833 F.2d 1365, 1371 (9th Cir.1987). Also, the Court may order a new trial under Rule 59 when the verdict is against the clear weight of the evidence. *Id.*

Irvin first contends that Southern Union did not prove that he was the "but for" cause of the injury on both claims

4. The Court took under consideration Irvin's motions regarding the punitive damages award of $60 million, and issued an opinion on that matter on July 31, 2003.

of liability. To prove the interference with contract claim, Southern Union had to prove that Irvin interfered with its Standstill Agreement by causing Southwest Gas to unfairly evaluate Southern Union's merger proposal. Under the interference with business relations claim, Southern Union had to prove that Irvin was the "but for" cause of the termination of the business relationship.

In his Motion, Irvin repeats a number of arguments capably presented to the jury at trial. First, Irvin argues that Southwest Gas never had any intention of considering the Southern Union offer in good faith, and therefore Irvin was not the "but for" cause of the breach of the Standstill Agreement. Second, Irvin argues that all members of the Southwest Gas Board testified that Irvin's letter and phone call were not factors in their decision to reject the proposed merger. Also, Irvin points out that the Board was presented with significant additional evidence disparaging Southern Union that sealed the rejection of Southern Union's offer without Irvin's interference in the decision.

As Southern Union points out, the Court already found sufficient evidence presented on summary judgment and repeated at trial that the Southwest Board was initially favorably inclined toward Southern Union, but became concerned after Irvin's letter and taped telephone call were disclosed to the Southwest Board. *Southern Union Co. v. Southwest Gas Corp.*, 180 F.Supp.2d 1021, 1055 (D.Ariz.2002). Southern Union also presented evidence at trial that Irvin's interference, keyed in part by his status as a regulator, was essential to the success of Maffie's efforts to sway the Southwest Board to reject the proposed merger. The

jury was entitled to believe this evidence and disbelieve the arguably self-serving testimony of other members of the Southwest Board who claimed to have rejected the proposed merger on the basis of other concerns, many of which were raised in depositions after Southwest Gas and the Board members were named as parties in this lawsuit. Significantly, the jury could have relied on the most relevant testimony of Manuel Cortez, a Board member, who was deposed along with Maffie's testimony *after* the SWG stockholders sued SWG for rejecting Southern Union's merger application but *before* Southern Union sued SWG. He and Maffie pointedly emphasized in their earlier depositions the importance of Irvin's letter and taped statement in the final decision of the Board to reject SUG as a merger partner.

Next, Irvin again argues that his actions were not improper, because they were legally engaged in according to his duties as a Corporation Commissioner. Again, this argument is substantially unavailing. Merely because Commissioner Irvin was vested with statutory powers as a Corporation Commissioner did not afford him legal immunity from using these powers improperly. At trial, Southern Union presented material evidence that Irvin's conduct was improper, particularly through the testimony of Judy Sheldrew and Gregory Patterson, who represented Arizona consumers as Director of the Residential Utility Consumer Office (RUCO) during the time of the merger, in conjunction with the inconsistent testimony of Maffie, Hartley, and Board member Cortez. Unequivocally, Corporation Commissioners have the power, and in some matters the duty, to thoroughly investigate proposed merger candidates, but they must do so neutrally, fairly, and without a preconceived animus against

one candidate, and personal bias and aggrandizement in favor of another. Moreover, the Commissioners are to eschew any effort to improperly influence their decisions. The evidence permitted the jury to find that the impropriety was easily inferred from Irvin's efforts at concealment of his activities, including the shredding of documents, the lack of a record of Irvin's travel plans, and evidence that he fabricated trial evidence. The evidence was sufficient for the jury to find improper conduct.

Finally, Irvin argues that Southern Union provided no evidentiary basis for concluding that Irvin knew of the Standstill Agreement, which is a necessary element for the interference with contract claim. The Court ruled on summary judgment that there was sufficient evidence to find that Rose knew of the Agreement and the prospective business relationship, which evidence was presented at trial. *Southern Union*, 180 F.Supp.2d at 1053. Further, the jury could infer Irvin's knowledge of the Agreement from Irvin's numerous interactions with Rose after the Agreement was signed, his very close relationship with him, and from Irvin's later efforts at concealment of his knowledge. Again, the jury was entitled from the evidence to discredit Irvin's testimony to the contrary.

For these reasons, Irvin's Motion for Judgment Notwithstanding the Verdict and for a New Trial were denied.

DATED this 24 day of August, 2003.

Roslyn O Silver

United States District Judge

APPENDIX F — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING ENTERED SEPTEMBER 16, 2005

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

423 F.3d 1117

SOUTHERN UNION COMPANY,
a Delaware corporation,

Plaintiff-Appellee,

v.

SOUTHWEST GAS CORPORATION, a California corporation; ONEOK INC., an Oklahoma corporation; MICHAEL MAFFIE; THOMAS HARTLEY; GENE DUBAY; THOMAS SHEETS; JOHN GABERINO; JACK D. ROSE; EDWARD ZUB; LARRY W. BRUMMETT,

Defendants,

and

JAMES M. IRVIN,

Defendant-Appellant.

Appendix F

SOUTHERN UNION COMPANY,
a Delaware corporation,

Plaintiff-Appellant,

v.

SOUTHWEST GAS CORPORATION, a California corporation; ONEOK INC., an Oklahoma corporation; MICHAEL MAFFIE; THOMAS HARTLEY; GENE DUBAY; THOMAS SHEETS; JOHN GABERINO; JACK D. ROSE; EDWARD ZUB; LARRY W. BRUMMETT,

Defendants,

and

JAMES M. IRVIN,

Defendant-Appellee.

Nos. 03-16649, 03-16729

September 16, 2005, Entered

ORDER

Before: REINHARDT, NOONAN, and FERNANDEZ, Circuit Judges

The opinion filed on July 13, 2005 is amended as follows:

* * *

With these amendments, the panel has voted unanimously to deny the petition for rehearing.

The full court has been advised of the petition for rehearing en banc, and no active judge has requested a vote whether to rehear the matter en banc. Fed. R. App. P. 35.

Appendix F

The petition for rehearing is DENIED and the petition for rehearing en banc is DENIED.

No further petitions for rehearing and for rehearing en banc will be entertained.

APPENDIX G — FEDERAL RULES OF APPELLATE PROCEDURE 4 AND 26

Rule 4. Appeal as of Right—When Taken

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

(B) When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered.

(C) An appeal from an order granting or denying an application for a writ of error coram nobis is an appeal in a civil case for purposes of Rule 4(a).

(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order— is treated as filed on the date of and after the entry.

(3) Multiple Appeals. If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

Appendix G

(4) Effect of a Motion on a Notice of Appeal.

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 10 days after the judgment is entered.

(B)(i) If a party files a notice of appeal after the court announces or enters a judgment—but before it disposes of any motion listed in Rule 4(a)(4)(A)—the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment altered or amended upon such a motion, must file a notice of appeal, or an amended notice of appeal—in compliance with Rule 3(c)—within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

(iii) No additional fee is required to file an amended notice.

(5) Motion for Extension of Time.

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

(B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 10 days after the date when the order granting the motion is entered, whichever is later.

(6) Reopening the Time to File an Appeal. The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and

(C) the court finds that no party would be prejudiced.

(7) Entry Defined.

(A) A judgment or order is entered for purposes of this Rule 4(a):

(i) if Federal Rule of Civil Procedure 58(a)(1) does not require a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a); or

(ii) if Federal Rule of Civil Procedure 58(a)(1) requires a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs:

• the judgment or order is set forth on a separate document, or

• 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79(a).

(B) A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58(a)(1) does not affect the validity of an appeal from that judgment or order.

(b) Appeal in a Criminal Case.

(1) Time for Filing a Notice of Appeal.

(A) In a criminal case, a defendant's notice of appeal must be filed in the district court within 10 days after the later of:

(i) the entry of either the judgment or the order being appealed; or

(ii) the filing of the government's notice of appeal.

(B) When the government is entitled to appeal, its notice of appeal must be filed in the district court within 30 days after the later of:

(i) the entry of the judgment or order being appealed; or

(ii) the filing of a notice of appeal by any defendant.

(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision, sentence, or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.

(3) Effect of a Motion on a Notice of Appeal.

(A) If a defendant timely makes any of the following motions under the Federal Rules of Criminal Procedure, the notice of appeal from a judgment of conviction must be filed within 10 days after the entry of the order disposing of the last such remaining motion, or within 10 days after the entry of the judgment of conviction, whichever period ends later. This provision applies to a timely motion:

(i) for judgment of acquittal under Rule 29;

(ii) for a new trial under Rule 33, but if based on newly discovered evidence, only if the motion is made no later than 10 days after the entry of the judgment; or

(iii) for arrest of judgment under Rule 34.

(B) A notice of appeal filed after the court announces a decision, sentence, or order—but before it disposes of any of the motions referred to in Rule 4(b)(3)(A)—becomes effective upon the later of the following:

(i) the entry of the order disposing of the last such remaining motion; or

(ii) the entry of the judgment of conviction.

(C) A valid notice of appeal is effective—without amendment—to appeal from an order disposing of any of the motions referred to in Rule 4(b)(3)(A).

(4) Motion for Extension of Time. Upon a finding of excusable neglect or good cause, the district court may—before or after the time has expired, with or without motion and notice—extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b).

(5) Jurisdiction. The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Federal Rule of Criminal Procedure 35(a), nor does the filing of a motion under 35(a) affect the validity of a notice of appeal filed before entry of the order disposing of the motion. The filing of a motion under Federal Rule of Criminal Procedure 35(a) does not suspend the time for filing a notice of appeal from a judgment of conviction.

(6) Entry Defined. A judgment or order is entered for purposes of this Rule 4(b) when it is entered on the criminal docket.

(c) Appeal by an Inmate Confined in an Institution.

(1) If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to

receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

(2) If an inmate files the first notice of appeal in a civil case under this Rule 4(c), the 14-day period provided in Rule 4(a)(3) for another party to file a notice of appeal runs from the date when the district court dockets the first notice.

(3) When a defendant in a criminal case files a notice of appeal under this Rule 4(c), the 30-day period for the government to file its notice of appeal runs from the entry of the judgment or order appealed from or from the district court's docketing of the defendant's notice of appeal, whichever is later.

(d) Mistaken Filing in the Court of Appeals. If a notice of appeal in either a civil or a criminal case is mistakenly filed in the court of appeals, the clerk of that court must note on the notice the date when it was received and send it to the district clerk. The notice is then considered filed in the district court on the date so noted.

* * * *

Appendix G

Rule 26. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute:

(1) Exclude the day of the act, event, or default that begins the period.

(2) Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days, unless stated in calendar days.

(3) Include the last day of the period unless it is a Saturday, Sunday, legal holiday, or—if the act to be done is filing a paper in court—a day on which the weather or other conditions make the clerk's office inaccessible.

(4) As used in this rule, "legal holiday" means New Year's Day, Martin Luther King, Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, Christmas Day, and any other day declared a holiday by the President, Congress, or the state in which is located either the district court that rendered the challenged judgment or order, or the circuit clerk's principal office.

(b) Extending Time. For good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires. But the court may not extend the time to file:

(1) a notice of appeal (except as authorized in Rule 4) or a petition for permission to appeal; or

(2) a notice of appeal from or a petition to enjoin, set aside, suspend, modify, enforce, or otherwise review an order of an administrative agency, board, commission, or officer of the United States, unless specifically authorized by law.

(c) Additional Time after Service. When a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 calendar days are added to the prescribed period unless the paper is delivered on the date of service stated in the proof of service. For purposes of this Rule 26(c), a paper that is served electronically is not treated as delivered on the date of service stated in the proof of service.

APPENDIX H — NOTICE OF APPEAL OF JAMES M. IRVIN FILED AUGUST 29, 2003

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

SOUTHERN UNION COMPANY,
a Delaware corporation,

Plaintiff,

v.

SOUTHWEST GAS CORPORATION, a California corporation, ONEOK, INC., an Oklahoma corporation, MICHAEL O. MAFFIE, THOMAS Y. HARTLEY, EDWARD ZUB, EUGENE N. DUBAY, JAMES C. KNEALE, JAMES M. IRVIN, in his individual capacity, JACK D. ROSE, JOHN A. GABERINO, JR., and MARK D. DIOGUARDI,

Defendants.

No. CIV 99-1294 PHX ROS

NOTICE OF APPEAL

Notice is hereby given that Defendant James M. Irvin hereby appeals to the United States Court of Appeals for the Ninth Circuit from this Court's Final Judgment, entered in this action on August 18, 2003. A copy of the final judgment is attached hereto.

Appendix H

RESPECTFULLY SUBMITTED this 29th day of August, 2003.

GREENBERG TRAURIG, LLP

By: s/ Barry Richard
Barry Richard
E. Jeffrey Walsh
Attorneys for Defendant
Commissioner James M. Irvin